IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CONFIRMATION CASE NO.2 OF 2004

The State of Maharashtra) … Appellant

Versus

Santoshkumar Satishbhushan Bariyar) … Respondent
(Orig. Accused 1)

Ms. U.V. Kejriwal, A.P.P. for the State-appellant.

Mr. Shirish Gupte, senior advocate, with Mr. Nitin Jamdar and Mr. Siddharth Likhite for the respondent.

ALONG WITH

CRIMINAL APPEAL NO.754 OF 2004
(By accused against conviction)

Santoshkumar Satishbhushan Bariyar)
Age 27 years, Occupation Nil, Residing at)
Vadgaon, B.K. Pune.) … Appellant
(At present in Yerawada Central Prison No.1) (Orig. Accused 1)

Versus

The State of Maharashtra) … Respondent

Mr. Shirish Gupte, senior advocate, with Mr. Nitin Jamdar and Mr. Siddharth Likhite for the appellant.

Ms. U.V. Kejriwal, A.P.P. for the State-respondent.

ALONG WITH

CRIMINAL APPEAL NO.869 OF 2004
(By accused against conviction)

1. Sanjeevkumar Mahendraprasad Roy)
Age 25 years, occupation Nil, residing at)
Naigaon, Mumbai.)
2. Santoshkumar Shrijailal Roy)
Age 25 years, occupation Nil, residing at)
Naigaon, Mumbai.)
(Originally residing at Dharampur,)
District Samastipur, Bihar))… Appellants
(At present Yerawada Central Prison)) (Orig. Accused 2 and 3)

Versus

The State of Maharashtra) … Respondent

Mr. Nitin Jamdar and Mr. Vijay Killedar for the appellants.

Ms. U.V. Kejriwal, A.P.P. for the State-respondent.

ALONG WITH

CRIMINAL APPEAL NO.874 OF 2004
(By State for enhancement of sentence)

State of Maharashtra) … Appellant
(Orig. Complainant)

Versus

1. Sanjeevkumar Mahendraprasad Roy)
Age 25 years, Occupation Nil, Residing)
at Naigaon, Mumbai.)
2. Santoshkumar Shrijailal Roy)
Age 25 years, Occupation Nil, Residing)
at Naigaon, Mumbai.)
(Originally residing at Dharampur,) … Respondents
District Samastipur, Bihar.)) (Orig. Accused 2 and 3)

Ms. U.V. Kejriwal, A.P.P. for the State-appellant.

Shri Vijay Nahar with Mr. Sudhir Shah, Mr. Nitin Jamdar and Mr. Vijay Killedar for respondents 1 and 2.

CORAM : SMT. RANJANA DESAI &
D. B. BHOSALE, JJ.

DATED : 12TH AUGUST 2005.

JUDGMENT : (Per Smt. Ranjana Desai, J.)

1. The respondents in Confirmation Case No.2 of 2004 (A-1, A-2 and A-3 respectively) along with approver PW-1 Kumar Gaurav (hereinafter referred to either as "PW-1" or as "the approver" or "Kumar Gaurav") were tried in the Court of Second Additional Sessions Judge, Pune at Pune in Sessions Case No.14 of 2002 for offences punishable under section 120-B, 364-A, 387, 302 and 201 read with section 120-B of the Indian Penal Code (for short, "the IPC") for hatching a criminal conspiracy to abduct one Abhijeet Kothari and/or Kartikraj and to demand a ransom of Rs.7 lacs and, thereafter, to commit murder and cause disappearance of the evidence and for abducting Kartikraj and keeping him in detention and for threatening to cause his death to compel his parents to pay a ransom and for putting Kartikraj in fear of death or grievous hurt with the help of fire arms and deadly weapons in order to commit extortion and for committing murder of Kartikraj between 8/8/2001

and 9/8/2001 and for causing disappearance of dead body of Kartikraj by cutting it into pieces and throwing it into the river. They were further charged for possessing revolver without a valid licence and alternatively A-3 was charged for contravention of section 4 of the Indian Arms Act punishable under section 25 thereof.

2. By judgment and order dated 18/5/2004, A-1 was convicted of the offences punishable under section 302 read with section 120-B of the IPC. He was further convicted of the offences punishable under section 364-A read with section 120-B of the IPC. For these offences, he was sentenced to death subject to confirmation by this court. A-2 and A-3 were convicted of the offences punishable under section 302 read with section 120-B of the IPC and they were sentenced to suffer RI for life and to pay a fine of Rs.1,000/- each, in default, to undergo further RI for three months. A-2 and A-3 were further convicted of the offence punishable under section 364-A read with section 120-B of the IPC and they were sentenced to suffer RI for life and to pay a fine of Rs.1,000/- each, in default, to undergo further RI for three months. A-1 to A-3 were convicted of the offences punishable under section 387 read with section 120-B of the IPC and they were sentenced to undergo RI for seven years and to pay a fine of Rs.1,000/- each, in default, to undergo further RI for

three months. A-1 to A-3 were convicted of the offences punishable under section 201 read with section 120-B of the IPC and they were sentenced to suffer RI for seven years and to pay a fine of Rs.1,000/- each, in default, to undergo further RI for three months. They were further convicted of the offence punishable under section 4 read with section 25 of the Indian Arms Act and sentenced to suffer RI for one year and to pay a fine of Rs.500/- each, in default, to undergo further RI for one month. Substantive sentences were ordered to run concurrently.

3. As required by section 366 of the Criminal Procedure Code, (for short, "the Code"), the learned Sessions Judge has made a reference to this Court and forwarded the records and proceedings of Sessions Case No.14 of 2002 to this court for confirmation of death sentence. The reference made by the learned Sessions Judge is numbered as Confirmation Case No.2 of 2004.

4. Criminal Appeal No.754 of 2004 is preferred by A-1 – Santoshkumar Satishbhushan Bariyar and Criminal Appeal No.869 of 2004 is preferred by A-2 Sanjeevkumar Mahendraprasad Roy and A-3 – Santoshkumar Shrijailal Roy. Criminal Appeal No.874 of 2004 is filed by the State of Maharashtra under section 377 (1) of the Code for enhancement of sentence awarded to A-2 and A-3. All these

matters arise out of the same judgment and, hence, they are being disposed of by this common judgment.

5. Before going to the gist of the prosecution case, it would be necessary to see how the crime came to be registered.

6. Deceased Kartikraj, (hereinafter referred to as "Kartikraj" for convenience), was working as a junior clerk in Central Railways at Pune. His father PW-49 S. Ramraj was serving as a manager at NABARD at Hyderabad. PW-50 Santosh Ramraj is the younger brother of Kartikraj. At the relevant time, Santosh Ramraj was staying with his father at Hyderabad. Their residential phone number at Hyderabad was 6582215. On 8/8/2001, at about 2.00 a.m. there was a threatening call at his house. The caller asked him to call his father on the line and told him that his brother Kartikraj was in his custody and he wanted Rs.10 lacs within 24 hours and if the money is not paid Bhailog would kill him. There were more threatening calls. S. Ramraj also talked to the caller and told him to give him time till morning so that he would make arrangement for money. At 3.30 a.m. S. Ramraj phoned his friend - PW-2 Dattatraya Bhadange, who was working as a manager in NABARD at Pune. He told him about the call and told him to make enquiry about his son. Bhadange tried to look for Kartikraj on the next day but he could not find him. He phoned S. Ramraj and told him that he should lodge a complaint. Since S. Ramraj was ill he sent a FAX to his

Pune office and requested Bhadange to send the complaint to the police station. He also sent photograph of Kartikraj by e-mail. Bhadange then filed complaint (Ex-56), at Balgandharva Police Chowky which is within the jurisdiction of Deccan Gymkhana Police Station. Complaint was filed along with FAX message Ex-57 and Ex-58. Crime was registered against unknown persons at C.R. No.335 of 2001 for the offences punishable under section 363 and 387 of the IPC. On 10/8/2001, the investigation was handed over to the Crime Branch. API Lotlikar started further investigation. On 10/8/2001, he received a phone call from Santoshraj enquiring about his brother. Santoshraj told him that he had received calls from kidnappers. They had asked him to come to Bombay with Rs.10 lacs and a mobile phone. API Lotlikar asked Santoshraj the name of his friend. Santoshraj gave him the name of one Sham Naidu. API Lotlikar told him that he should give the caller his mobile phone number 9822056021 as being the number of his friend Sham Naidu. Santoshraj did accordingly.

7. The kidnappers then started calling API Lotlikar on his mobile phone thinking him to be Sham Naidu. API Lotlikar took various steps in investigation, engaged the kidnappers in conversation from various places and with the help of police party laid a trap at Juhu on 12/8/2001 and nabbed three accused. The fourth accused was nabbed at Andheri Railway Station. He asked them about the whereabouts of Kartikraj. The accused gave false information and took the police from one place to another. But

Kartikraj was not traced. Realising that the accused are dodging his questions, API Lotlikar produced them before P.I. Dilip Shinde in his office at Pune on 13/8/2001. P.I. Shinde arrested them. On 13/8/2001, investigation was handed over to P.I. Shinde.

8. On 29/10/2001, accused Kumar Gaurav addressed a letter to the Commissioner of Police, Pune City (Ex-33) stating that on 8/8/2001 he and his companions had committed murder of Kartikraj and he has all the details of that incident. He further stated that he was repenting for what he has done and, hence, he wants to make a confession before the court. He prayed that he may be produced before the court for that purpose. On 31/10/2001 he was produced before J.M.F.C. (AC) Court Pune at 2.00 p.m. The learned Magistrate inter alia, asked PW-1 whether he has any complaint to make against any police officers about ill treatment. He answered in the negative. The learned Magistrate ascertained whether any allurement was given to him to make a statement. PW-1 answered in the negative. The learned Magistrate told him that he is not in police custody and that he is not bound to make a confession and if he makes a confession it may be used against him. PW-1 confirmed his desire to make a confessional statement The Magistrate gave him time till 2.00 p.m. on 1/11/2001 to reflect on his decision. He was again produced before the Magistrate and on 1/11/2001 at 2.00 p.m. he again expressed his willingness to confess. The learned

Magistrate then recorded his confessional statement under section 164 of the Code in accordance with law.

9. It must be mentioned here that on 18/2/2002, PW-1 had addressed a letter to the Additional Sessions Judge, Pune, stating that he had made confessional statement on 1/11/2001 due to fear and under pressure of Crime Branch and that he was falsely implicated in the case. This letter is at Ex-4. On 3/4/2002, he addressed another letter to the District and Sessions Judge, Pune, which is at Ex-12 stating that he had submitted his application dated 18/2/2002 due to pressure of his father and that he did not want to retract his confession. By this letter, he withdrew his application dated 18/2/2002. In this letter, he also stated that he had not sent application dated 6/11/2002 to J.M.F.C. Rathod retracting his confession.

10. We shall deal with the aspect of the alleged retractions of Kumar Gaurav at appropriate stage as his evidence is assailed by the learned defence counsel mainly on the basis of these retractions. The learned counsel have contended that PW-1's confessional statement is not voluntary as it is the result of inducement, threat or promise. The learned A.P.P. has denied these allegations.

11. On 21/3/2002, investigating officer PW-53 Dilip Shinde made application under section 307 of the Code before the Sessions Court, Pune,

praying that pardon be granted to Kumar Gaurav. On 3/4/2002, the learned Sessions Judge granted pardon to PW-1 on condition of his making full and true disclosure of all the facts and circumstances within his knowledge relating to Kartikraj's murder.

12. The investigation, inter alia, included discoveries at the instance of the accused of their clothes, clothes and articles of the deceased, weapons and leg of Kartikraj, conducting of identification parade of weapons and of the accused, collection of printouts from the STD booths from where calls were made by the accused to threaten the family members of Kartikraj and to API Lotlikar who posed as Sham Naidu. The accused came to be charged as aforesaid on 30/4/2002.

13. At the trial, in support of its case, the prosecution examined as many as 53 witnesses. The star witness of the prosecution is the approver PW-1 Kumar Gaurav. The prosecution also examined the father and brother of Kartikraj, the owners of the flat where the accused had stayed, panch witnesses to prove discoveries made at the instance of the accused, shop owners from whose shops the accused had purchased various articles and sim cards, the STD booth owners from where the accused made phone calls and the persons who held identification parades. The Magistrate who recorded confessional statement of PW-1 was also examined. The

prosecution led the evidence of experts. Five police personnel were examined to bring on record details of investigation.

14. It is necessary to narrate the detailed account of the incident in question as deposed by the approver PW-1 Kumar Gaurav in his evidence as that unfolds the prosecution story and it is its basis. PW-1 has stated that he holds BSC Degree from Samasthpur College, Bihar. He is a music composer. He wanted to visit Bombay to hand over his Music Album to T Series Music Company. On 25/7/2001 A-3 Santosh Kumar Roy who is also from Bihar came to his place and asked him when he was proceeding to Bombay. He told him that he was to go to Bombay on 31/7/2001. A-3 told him that he and his friend Sanjeev Kumar Roy A-2 also wanted to go to Bombay. A-3 further told him that he wanted to go to Bombay in search of a computer course and A-2 wanted to go to Bombay in search of a job and therefore PW-1 should make reservation for them also.

15. PW-1 accordingly reserved seats on Patna Kurla Super Fast Express. On 31/7/2001 they boarded train at Patna. On 1/8/2001 their train reached Kalyan. When the train halted near the outer signal they alighted from the train. From the outer signal they went to Kalyan Railway Station. At Kalyan Railway Station A-2 told him that one of his friends was residing at Pune and it would be better to proceed to Pune and stay

there as that would be economical. Then they came to Pune by Sahyadri Express at about 10.30 p.m.

16. After they reached Shivaji Nagar Railway Station at 10.30 p.m. A-2 phoned his friend from a telephone booth situate outside the station, A-2 told them that his friend Santosh Kumar Bariyar A-1 was arriving there within 10 minutes for receiving them. Within few minutes, A-1 arrived there. A-2 introduced PW-1 to him.

17. A-1 told them that he had not received possession of his flat from his agent and he would take them to Koregaon Park where his relative was staying. A-1 took them to Popular Heights Colony where his relative Kamal Prashun was residing. At the gate they met a watchman. He told A-1 to enter their names in the register. A-1 wrote the names as Prakash, Navin and Sunil and put his signature on the register. PW-1 asked him as to why false names were entered, he told him "aisa chalta hai". They went to Kamal Prashun's flat. PW-1 was introduced to Kamal Prashun by A-1. A-1 told Kamal Prashun that they were his friends and they were proceeding to Satara in search of a job. They had no accommodation at Pune and therefore they were brought to his place. Kamal Prashun allowed them to stay there.

18. On 2/8/2001 A-1 contacted his agent Pramod Dodke on phone and enquired with him about his flat. Dodke told him that he was not able to make any arrangement for him but promised that by next morning he would make arrangement. They spent the day watching T.V. and spent that night in Kamal Prashun's flat.

19. On 3/8/2001 at night at 9.30 p.m. they went to Dhayariphata to meet Dodke. Dodke was present in his office. A-1 asked him about the flat. Dodke told him that he could not make any arrangement. A-1 asked him that though he had paid the deposit amount why he could not make any arrangement for the flat and since his friends had arrived he was in need of accommodation. Dodke assured them that he would arrange for a flat.

20. At about 12 noon Dodke took them to his flat at Kudale Patil Aangan Apartment. They stayed there between 12 noon of 3/8/2001 to 4 p.m. of 4/8/2001.

21. At night (between 3/8/2001 to 4/8/2001) A-1 told them that he had a plan whereby they can earn Rs.10 to Rs.15 lacs. He had a friend by name Abhijeet Kothari whose father was a doctor. He had another friend by name Kartikraj whose father was the Manager in NABARD. They were rich. He told them that they would kidnap these boys and would make demand for money from their families and if any difficulty arises

they would kill them. He told them that their dead bodies would be cut into pieces and the pieces would be thrown at some place after putting them in different bags. He asked them whether they were ready for such a plan. They expressed their consent.

22. He further told them that for execution of the plan he would require some articles. He asked PW-1 to prepare a list according to his suggestion. He told them that articles like sickle, hacksaw blades, rope, cello tape, Dettol, sim card, 7 polythene bags and 3 rexin bags were required. Blade and sickle were required for cutting dead bodies into pieces, rope was required for tying the hostages, polythene bags were required for putting pieces of dead bodies and then rexin bags were required for putting polythene bags containing pieces of dead bodies in it. Sim Card was required for using mobile phone for contacting family members of these hostages. Dettol was required as a deodorant. PW-1 prepared the list accordingly. After discussing the plan they slept.

23. On 4/8/2001 at about 5.30 to 6 a.m. A-1 told them that he had selected one place for disposing of the pieces of dead bodies. He asked them to accompany him to visit that spot. At about 8.30 a.m. they went to Khadakwasla Dam. A-1 pointed out to them one place near Khadakwasla Dam where he had decided to throw pieces of dead bodies. The spot was approved by them. Thereafter they returned to their flat.

24. At about 4 p.m. Dodke took them to Amrapali society for showing them a flat. The flat was approved by A-1. They shifted their baggage there.

25. At about 8.30 p.m. they went to Swargate S.T. Stand by an auto rickshaw. They purchased 7 polythene bags, 3 rexin bags from one shop for Rs.395/-. The price was paid by A-1.

26. From Swargate S.T. Stand they went to Deccan Gymkhana by an auto rickshaw. PW-1 purchased Sim Card from Prasad Medical Stores for Rs.750/-. It was a card of AT & T Company bearing No. 9822148663. The sim card was loaded in his Motorola Mobile phone. The shopkeeper gave him a form, he filled the form and signed on it. He mentioned his true name and address on the form. They then returned to the flat. A-3 removed a revolver and 3 cartridges from his bag. They discussed the plan and went to sleep.

27. On 5/8/2001 at about 5.30 a.m. A-3 contacted his friend Bhiku of Samastipur on his phone and requested him to convey message to his family that he would return to Samastipur on 10/8/2001. A-1 told them that they would purchase a sickle and hacksaw blade from some other place and not from Pune. At 9.30 in the morning they took train for Lonavala.

From Lonavala they went to Khandala Railway Station by an auto rickshaw. A-1 told them that he would ask family members of his hostages to throw bag containing money on the Khandala Railway Station platform as it was a calm and quiet area. They approved the idea. They returned to Pimpri Railway Station. From Pimpri Railway Station they went to Pimpri Market. At about 1.30 p.m. they went to Minu General Stores. They purchased 5 hacksaw blades and one hacksaw frame from that shop and paid Rs.45/- to Rs.50/-. The money was paid by A-1.

28. From that shop they went to Asha Hardware shop. PW-1 and A-3 went inside the shop. They purchased sickle from that shop. For paying the price of sickle A-3 called A-1 in the shop. The shop keeper asked them for what purpose the sickle was required. They spent considerable time there. A-1 told the shopkeeper that sickle was required for cutting coconuts. Then they returned to Pimpri Railway Station and from Pimpri Railway Station they went to Pune Railway Station.

29. After they arrived at Pune Railway Station, A-1 told them to proceed to the flat. He told them that he would ascertain whether Abhijit Kothari and Kartikraj were in town. Accordingly three of them returned to the flat. At the flat A-2 told them that he had noticed a shop of iron-smith near Vadgaon Canal and that he would go to that shop and sharpen the sickle. He did not return for a considerable time. Hence A-3

went in search of him. Sometime thereafter both of them returned. A-2 told them that he had purchased one more sickle from iron-smith.

30. At about 7.30 p.m. PW-1 contacted his cousin at Sitamandi on his mobile between 7 & 7.30 p.m. He received a call from A-1 on his mobile phone that Abhijit Kothari and Kartikraj were not available. At about 9.30 A-2 contacted one Prakash at Samastipur on PW-1's phone. A-1 returned at about 10 p.m. and told them that he would search for Abhijit Kothari and Kartikraj on the next day. They spent time talking to each other, they had dinner and then went to sleep.

31. On 6/8/2001 at about 8.30 a.m. A-1 contacted Abhijeet Kothari at his hostel on PW-1's mobile phone, he could not contact him. At about 9.30 a.m. A-1 left the flat for taking search of Kartikraj. He returned at about 3 p.m. He told them that he was not able to contact Kartikraj but he had secured his telephone number and that he had left a message for Kartikraj. He told them that at any rate he would bring Kartikraj on the next day. When PW-1 asked him how he was so sure, he told him that he had promised Kartikraj a party for his marriage and therefore Kartikraj will come. Thereafter they discussed their plan and slept.

32. On 7/8/2001 A-1 contacted owner of the house where Kartikraj was staying on PW-1's mobile phone between 7 to 8 a.m. He told the

owner that he would phone after 5 - 10 minutes and he should call Kartikraj. After sometime A-1 again phoned. Kartikraj was available on the other side. A-1 told him that he did not know the address of his flat. A-1 told him that he should go to his flat situate at Koregaon Park from where he would collect him and bring him to his flat at Amrapali.

33. At about 9.30 a.m. they went to a shop where V.CDs were available. A-1 asked the shop keeper to give him on hire colour T.V and V.C.R. player. The shop keeper told him that it was not possible to give anything on hire to an unknown person and he should bring someone known to him from the locality. All of them went to Pramod Dodake's office. Mr. Sant partner of Dodke was present. Mr. Sant wrote a message for the shop keeper on his visiting card and handed it over to them. They gave that card to the shop keeper. The shop keeper gave them one colour T.V., one V.C.R. and 2 C.Ds on rent. The C.Ds. were of the movies "*This world is not enough*" and "*Khunni Raat*". They returned to the flat. They spent the time watching movies.

34. At about 3 p.m. A-1 left the flat for receiving Kartikraj at Koregaon Park flat. Three of them were in the flat. At about 6 p.m. PW-1 received a call from A-1 on his mobile phone. A-1 told him that he was coming to the flat at about 8 p.m. with Kartikraj. He asked him whether they were ready. P.W 1 told them that they were ready. He again received a call from

him at 6.40 p.m. on his mobile phone. He told him that he would be reaching the flat within 20 minutes.

35. At about 8 p.m. A-1 and Kartikraj arrived. Kartikraj was carrying a green coloured bag bearing Nike Mark (M.A. 20). A-1 had with him a big bottle of rum. They started eating and drinking.

36. At about 9.30 p.m. Dodke arrived in their flat. He enquired about Kartikraj. A-1 introduced Kartikraj to him. After spending about 15 minutes Dodke left the flat. A-2 left the flat for bringing some C.Ds. After Kartikraj and A-2 had left the flat, A-1 concealed rope and sickle beneath his mattress. A-3 removed revolver from his pocket, he filled it and concealed it beneath his mattress.

37. Kartikraj and A-2 returned to the flat after sometime. Kartikraj had brought 2 C.Ds. one of "*Satya*" and other of "*Evil Dead*". A-2 had a bottle of Pepsi. They spent time till mid night enjoying their drinks. At about 12 mid night A-1 gave signal to A-2. A-1 went behind K artikraj with sickle. A-3 removed his revolver and placed it on the head of Kartikraj. A-1 kept the sickle on the neck of Kartikraj. A-1 threatened Kartikraj and asked him to keep quiet and told him that otherwise he would be killed. A-1 told PW-1 to hold both the hands of Kartikraj. He told A-2 to tie both the hands of Kartikraj. Accordingly both the hands of Kartikraj were held by

PW-1 and tied by A-2. Thereafter one napkin was tied on the mouth of Kartikraj. Kartikraj was then dragged by A-1 and A-2 towards toilet. A-3 thereafter started acting like Manoj Bajpai in "Satya" movie. He started threatening and assaulting Kartikraj. This went on for two hours.

38. At about 2 a.m. A-1 removed money purse from Kartikraj's pocket. In that money purse, identity card of Kartikraj and visiting card of his father were found. On the visiting card name of Kartikraj's father was mentioned as S. Ramraj, telephone numbers of his office as well as residence were also mentioned. PW-1 was asked by A-1 to contact Kartikraj's father on phone as PW-1 was singer and he had the ability to change his voice. He told him to tell Kartikraj's father in Bambayya Hindi that Kartikraj was in their custody and he should make arrangement for Rs.10 lacs within 24 hours or otherwise we Bhailok would kill him.

39. Accordingly PW-1 dialed on his mobile phone. When call was received by somebody he asked him to call S. Ramraj on line. The person receiving the call told him that it was not a proper time to call and S. Ramraj was sleeping. He said that he was the son of S. Ramraj. PW-1 then told him that his brother Kartikraj was in their possession and they should make arrangement of Rs.10 lacs within 24 hours or otherwise we Bhailok would kill him. He asked him to allow him to talk to Kartikraj. PW-1 told him that he would be allowed to talk to Kartikraj after

some time. Thereafter PW-1 disconnected the phone and told Kartikraj that he was going to allow him to talk to his brother but he should inform his brother that he was in their custody and that his brother should act according to their directions otherwise he would be killed. Then PW-1 again dialed Hyderabad number. Kartikraj was told to talk to his brother in Hindi. PW-1 held the phone near the ear of Kartikraj. Kartikraj told his brother that he was in their custody and they should act according to their directions. After that PW-1 disconnected the phone.

40. After sometime PW-1 again contacted the residence of Kartikraj's father on his mobile phone and told Kartikraj's brother to call his father on phone and disconnected the phone. Sometime thereafter PW-1 again dialed the same number. Kartikraj's father was available. PW-1 told him to make arrangement for Rs.10 lacs within 24 hours and told him that his son Kartikraj was in their custody. He was told that if he failed to make arrangement Kartikraj would be killed. Kartikraj's father told him that he would arrange for some amount and he should contact him on the next day in the morning. After this PW-1 disconnected the phone. A-1 and A-2 stayed in the room where Kartikraj was kept. They had weapons with them. PW-1 and A-3 went to bed in the other room.

41. On 8/8/2001 early in the morning at about 5 a.m. A-1 and A-2 went out to dispose of Kartikraj's motorcycle. They returned after about one and half hours.

42. At about 8.30 a.m. A-1 told PW-1 and A-3 that they should go to Sarasbag area and contact Kartikraj's father on STD booth. Accordingly PW-1 and A-3 went to Sarasbag area and contacted Kartikraj's father from STD telephone booth. PW-1 enquired with Kartikraj's father about money. He told him that he was proceeding towards his office and he was making arrangement for the money. They returned to the flat. Thereafter they returned the T.V. set, V.CDs. and V.CD player to the shop keeper.

43. Kartikraj was freed for sometime for going to the toilet. The door of the toilet was kept open. A- 2 was standing at the door with revolver in his hand. Others were standing outside. When Kartikraj returned from toilet, A-1 asked him how much money his father would be in a position to give. Kartikraj told them that his father was ill and he could collect about Rs.4 to 5 lacs. Kartikraj told A-1 that they were friends and why A-1 was behaving like this and that if he is released he would pay any amount. A-1 assaulted Kartikraj with kicks and fist blows.

44. At about 2 p.m. A-1 told PW-1 to contact Kartikraj's father on phone. Accordingly PW-1 phoned Kartikraj's father. Kartikraj's father

asked for some more time to make payment. PW-1 told him that he would phone him again. PW-1 told A-1 that Kartikraj's father was asking for more time. A-1 told him to inform him that 20 hours time was given to him as a last opportunity. This message was communicated to Kartikraj's father by PW-1. At about 4 p.m. somebody knocked at the door. They were frightened. A-1 told PW-1 that he would lock the room wherein Kartikraj was kept from inside and if anybody asked about him he should be told that A-1 had gone to Kalyan. A-1 and A-3 locked themselves inside the room with Kartikraj. A-2 was outside with PW-1.

45. The door was opened. A man standing at the door told them that he was the owner of the flat and that he wanted to remove big pillow from the room in which he had kept his belongings. He could not locate his pillow. He asked PW-1 as to why one room was locked. PW-1 told him that his friend A-1 was staying in that locked room and that he would be returning from Kalyan on the next day in the morning. The man requested PW-1 to remove the said pillow from the locked room after availability of A-1 and keep it in his room. He handed over the keys to PW-1 and requested him to hand them over to Dodke. He left thereafter.

46. At about 4 p.m. PW-1 and A-1 went to Dhayariphatta for having tea. A-1 told him that it would be dangerous to keep Kartikraj alive and it was essential to kill him. PW-1 agreed. Then they returned to the flat.

47. PW-1 was talking to A-3 in the other room. They were called in the room where Kartikraj was kept by A-1. When they reached that room they noticed that Kartikraj was lying on the ground. His hands and legs were tied. A napkin was tied around his mouth. A rope was tied around his neck. A-1 and A-2 were pulling the ends of the ropes. A-1 told A-3 to sit on his chest and hold his mouth tight. They did accordingly. A-2 was tired of pulling the rope. A-3 then took place of A-2 and started pulling the rope. A-1 had touched his legs to Kartikraj's body for giving strength for pulling the rope. Kartikraj's movements stopped after some time. A-1 thereafter checked Kartikraj's pulse. He attempted to hear the heart beats of Kartikraj. He then told them that Kartikraj was not alive. Kartikraj's dead body was dragged towards toilet by A-1 and A-2. A-1 separated the head of Kartikraj by hacksaw blade. He also used sickle for that. When the head was separated A-1 asked A-2 to bring one polythene bag. A-1 then kept the head in the polythene bag. A-2 was told to keep the head of Kartikraj in a rexin bag by A-1. Thereafter both the hands of Kartikraj were separated by A-1. Again A-2 was asked to bring polythene bag. Hands were kept in polythene bags. A-1 was asked to keep polythene bag in a rexin bag. By this time A-1 was tired. He directed A-2 to cut leg of Kartikraj. A-2 then cut off Kartikraj's one leg into two pieces. He was not able to cut other leg. A-1 then turned that leg into 360 degrees and

thereafter it was cut with the help of hacksaw blade. PW-1 and A-2 packed the legs in separate bags.

48. Approximately two hours time was spent in cutting Kartikraj's body in pieces. All the while the water tap was kept open. The blood oozing out was allowed to go in the toilet with water. Middle portion of the body was bigger in size. They were not able to keep it in a polythene bag. It was therefore wrapped in a piece of plastic which was found in the room. Thereafter it was tied in a bed sheet and it was kept in the kitchen. A-1 cleared the wall which was stained with blood with wet cloth. He washed his clothes which were stained with blood.

49. For keeping middle portion of the body, A-1 told them to purchase one more rexin bag. They had a wash and they went to Pune Railway Station by an auto rickshaw. PW-1 and A-1 purchased one big black coloured bag at Pune Railway Station for Rs.450/-, which were paid by A-1. They returned to the flat with the bag. Middle portion of the body was kept in that bag. In one blue coloured rexin bag leg of Kartikraj was kept. In one red coloured bag one hand and one piece of leg were packed. With these two bags they went to Dhayariphata. From Dhayariphata they went to Swargate and after changing auto rickshaw from Swargate they went to Deccan. After crossing the bridge they went by the bank of the river. There was another bridge and a temple on the way. One blue coloured

bag was concealed by PW-1 and A-1 in the bushes near the bridge. Red colour bag was concealed by A-2 and A-3 behind the temple.

50. Then they returned to the flat by an auto rickshaw. A-3 halted at Dhayariphata Square. He told them to bring remaining bags from the flat and told them that he would stop another auto rickshaw in the meantime.

51. PW-1, A-1 and A-2 went to the flat. A green coloured rexin bag wherein head and one leg and hand were kept was carried by A-2. PW-1 and A-1 carried big black coloured bag wherein middle portion of the body was kept. Small bag belonging to Kartikraj containing his belongings was carried by A-2. When they reached near Dhayariphata square A-1 told them that it was risky to carry heavy bag containing middle portion of the body to a longer distance and hence they should dispose it of nearby i.e. in Vadgaon Canal.

52. A-1 and A-2 boarded an autorickshaw with rexin bag and proceeded towards Vadgaon canal. PW-1 and A-3 proceeded towards Vadgaon Canal on foot. PW-1 and A-1 carried rexin bag containing middle portion of the body on the bridge of Vadgaon Canal and threw it in the Canal on the left side of the bridge. At the same time A-3 threw another bag containing the head and other portion of the body on the right

side of the bridge in the Canal. Thereafter they went ahead. There was one more bridge. Kartikraj's bag containing his licence and other articles was concealed beneath the bridge by A-3. They hired an auto rickshaw and went to Pune Railway Station. They spent time till 5 a.m. at Pune Railway Station.

53. A-1 told them that it is essential to dispose of the articles lying in the flat. PW-1 and A-3 refused to go to the flat. They asked A-1 to go there with A-2. Accordingly, A-1 and A-2 went to the flat. They returned to the station at 8 a.m. They had with them their bags and other articles. A-1 told them that his clothes were lying at his flat in Koregaon Park. He told them that he would go to Koregaon Park flat and bring his clothes and in the meantime dispose of the articles brought by him from Dhayariphata flat (Amrapali). A-2 expressed his willingness to go with A-2.

54. At about 9 a.m. both of them returned to Pune Railway Station. A-1 told them that he had thrown articles in the river and there was no reason for tension. At about 9.30 a.m. they went to Lonavala by local train. PW-1 contacted Kartikraj's father from a telephone booth at Lonavala and enquired about the money. He told PW-1 that he was making efforts to collect money and that he should contact him afterwards.

At about 12.30 noon they went to Karjat by local train. From Karjat they took another train to Dadar.

55. On 9/8/2001 they went to Naigaon from Dadar by local train. They went to the flat of Rajeshkumar which was situate in Pereira Housing Society at Naigaon. A-3 introduced all of them to Rajeshkumar and his partner. Thereafter they took wash. A-1 said that they had done so many things and now in any case they will have to take money and thereafter they can proceed. A-1 asked PW-1 to contact Kartikraj's father on phone and ask him about the money. They contacted Kartikraj's father on mobile phone of PW-1. Kartikraj's father told PW-1 that he was not able to make arrangement for money but assured him that by next day he will make arrangement and that he should contact him again on phone on the next day. They discussed how the amount is to be received and then they slept.

56. On the next day i.e. on 10/8/2001 PW-1 again contacted Kartikraj's father on phone. Kartikraj's brother received the call. He told them that they were able to collect a lac of rupees and that man had already left Hyderabad with a lac of rupees. PW-1 asked for his name and contact number. Kartikraj's brother told him that he did not have the contact number and he should call him in the afternoon and by that time he would be in a position to furnish contact number. Then he disconnected the phone. At about 12 noon they went to Andheri by local train.

57. By that time their funds were exhausted. A-1 sold his gold chain for Rs.3,000/- at one shop. At about 1 p.m. A-1 told PW-1 that he should contact Kartikraj's brother. Accordingly, PW-1 contacted Kartikraj's brother from STD Booth and asked him to give the name of the person who had left Hyderabad and his contact number. Kartikraj's brother told him that he was not able to contact the man who had left Hyderabad. He asked PW-1 to call him again in the evening. Thereafter A-1 and A-2 returned to Naigaon. P.W 1 and A-3 went to the office of T Series Company at Andheri and PW-1 handed over his music album there. He and A-3 returned to Naigaon at 6 p.m. Then they went to Virar by local train. PW-1 again contacted Kartikraj's father from telephone booth situate near Virar Railway Station. Kartikraj's brother received the call. He told PW-1 that the name of the person who had left Hyderabad with money was Naidu and his number was 9822056021. PW-1 told him to inform that person that he should reach Dadar around 10 O'clock in the morning on the next day. He told him to inform Naidu that he will contact him at that time. Thereafter they returned to the flat. They discussed how the money is to be received. Then they had dinner and they slept.

58. On 11/8/2001 at about 10.30 in the morning they contacted Naidu on his mobile phone. He told them that he had reached Dadar. PW-1 told him that he should contact him later on and he disconnected the phone.

Then they went to Thane by local train. They purchased a prepaid BPL mobile sim card from one shop at Thane for Rs.750/-. PW-1 filled a form given by the shop keeper in his hand writing. He wrote address of Naigaon flat on the form. He signed on the form.

59. From Thane PW-1 contacted Naidu on mobile. He asked him where he was. Naidu told him that he was at Dadar. PW-1 told him that he would call him afterwards and tell him where to meet. They went to Kalyan by local train. They again contacted Naidu from Kalyan. PW-1 told him to board Sinhagad Express which leaves Dadar Railway Station at about 2 p.m. Naidu told him that he will board Sinhagad Express as per his directions and will proceed to Pune. When Sinhagad Express reached Kalyan, PW-1 attempted to contact Naidu on phone but he could not. After some time he was able to contact him. He asked him why he did not board Sinhagad Express, Naidu told him that he could not do so because of the crowd. Naidu told him that he has taken another train which leaves Dadar Railway Station at 3 p.m. and he has already started his journey. At about 4 p.m. that train reached Kalyan. PW-1 contacted Naidu on phone. PW-1 told him that he should be ready with money and he should throw it out from the train as and when he is told to do so. A-1 and A-2 then went to outer signal of Kalyan Railway Station. He contacted Naidu on phone. By that time the train had reached outer signal. PW-1 told Naidu to throw bag containing money out of the train. Naidu told

PW-1 that there was rush in the train and he was sitting in the middle portion of the compartment and he was not able to reach up to the window. After some time PW-1 lost contact with him.

60. Thereafter they went outside Kalyan Railway Station. A-1 said that Naidu was not in a mood to hand over the money to them. He told PW-1 to contact Kartikraj's brother at Hyderabad and ask him whether he is willing to give the amount or not. PW-1 contacted Kartikraj's father at 4.30 p.m. and told him that Naidu did not act according to their directions. Kartikraj's brother told him that he was willing to give the amount. PW-1 told him that if he does not do so Kartikraj would be killed. He told him that he would contact Naidu and disconnected the phone.

61. At about 5.30 p.m. he contacted Naidu on phone and asked him from where he was talking. Naidu told him that he was at Lonavala. PW-1 told him to board the train and come to Dadar. He told him that he would come to Dadar according to his directions and disconnected the phone. Then they went to Sagar Theatre and saw a movie. They left theatre at the time of interval. They went to market where PW-1 recharged his mobile. The sim card number of his mobile phone purchased at Thane was 9821260381.

62. Thereafter they went to Kalyan Railway Station at about 10.30 p.m. They went to Dadar. When they were proceeding to Dadar PW-1 attempted to contact Naidu from the train. PW-1 was able to contact him. He asked Naidu from where he was talking. Naidu told him that he was at Dadar. PW-1 told him that he should wait there only and that they were proceeding to Dadar. Naidu told him that he was tired and that he was proceeding to Pune by taxi. PW-1 requested him to wait. But Naidu was not ready to wait. PW-1 disconnected the phone. Thereafter they returned to the flat at Naigaon. They discussed the matter and went to sleep.

63. On 12/8/2001 PW-1 contacted Naidu on phone. He told him to come to Bombay with money. Naidu told PW-1 that he would come to Bombay by taxi. They went to Naigaon Railway Station and from Naigaon they went to Andheri. PW-1 contacted Naidu from Andheri and asked his location. Naidu told him that he was crossing Panvel. PW-1 told him that he will contact him afterwards.

64. From Andheri Railway Station they went to Juhu Church. Again PW-1 contacted Naidu from Juhu Church and asked his location. Naidu told him that he was crossing Kurla. PW-1 told him to come to Andheri Railway Station. From Juhu Church they went to Juhu Chowpati. Again PW-1 contacted Naidu and asked his location. He told him that he was at Andheri Railway Station. PW-1 told him to come to Juhu Chowpati by

autorickshaw. Then they went to the seashore. A-1 told PW-1 that Naidu must have reached Juhu Chowpati. He asked A-2 and A-3 to keep a watch. He told them that he would ask Naidu to come near the statue of Shivaji which was in front of a big hotel at Juhu. After their departure, PW-1 contacted Naidu on phone. Naidu told him that he had reached Juhu Chowpati. PW-1 told him to go towards the statue of Shivaji. PW-1 told him that he will contact him afterwards. After some time A-2 and A-3 returned, A-2 told him that one man was standing in a frightened state with a bag in his possession near Shivaji Statue and he must be Naidu. A-1 told PW-1 that they should contact him on mobile phone and if he receives call it will be certain that he is Naidu. A-1 told A-2 that if he receives the call, he should go to him and ask his name.

65. After A-2 and A-3 left, PW-1 contacted Naidu on phone. Naidu received the call. PW-1 asked him whether he was at the same place. Naidu answered in the affirmative. PW-1 told him that he would contact him shortly. A-2 and A-3 returned after sometime. They stated that the said person was Naidu as he had received the call. A-2 told him that on enquiry that person told him that his name was Naidu and he was coming from Hyderabad. When A-2 told him to hand over the money, that person had asked A-2 to bring Kartikraj. A- 2 told him that he will contact his boss and thereafter he would talk to him. A-1 told him that he would call that person towards the seashore. He asked A-2 to keep watch on that

person and told A-3 to keep watch on A-2. After their departure PW-1 contacted Naidu on phone. He told him to come to the seashore. Naidu said that he would come to the seashore. Naidu did not come to the seashore even after lapse of considerable time. PW-1 contacted him on phone and asked him why he was late. He told him that he was coming. Even thereafter he did not come. A-1 told PW-1 to go and see why A-2 and A-3 were not coming. Accordingly PW-1 reached Shivaji Statue. He did not notice anybody. He started returning to A-1. When he was returning somebody caught him from behind. He turned and saw A-2 and A-3 were held by somebody. He realised that he was caught by the police.

66. Police took his search and seized his mobile. They asked them about their fourth companion. They were told that he was at Juhu Chowpati. At Juhu Chowpati he was not found. Police again asked where the fourth companion might be. PW-1 told them that he may be at Andheri Railway Station. They went to Andheri Railway Station. A-1 was there. He was pointed out by them. He was caught by the police. A-1's search was taken. Gold ring having letter 'K' (M.A. 46) was recovered from him. It was returned to him by the police. When they were returning to Pune the gold ring was handed over to A-3 by A-1. They were initially brought to Kudle Patil Angan premises by the police. Thereafter they were taken to the office of Crime Branch, Pune. They were arrested on 13/8/2001.

67. The accused denied the prosecution case and claimed to be innocent. They examined two defence witnesses namely DW-1 Girish Pawar and DW-2 Abhimanyu Karkhanis. We shall advert to their defence at length a little later.

68. After perusing the evidence on record, the learned Sessions Judge came to a conclusion that the prosecution had proved its case against the accused.

69. The learned judge held that deceased Kartikraj met with homicidal death; that the prosecution has proved that in between 3/8/2001 and 4/8/2001, A-1, A-2, A-3 and PW-1 in the flat at Kudale Patil Angan Apartment hatched criminal conspiracy to abduct Abhijeet Kothari or Kartikraj and to demand ransom and further to commit murder and to cause disappearance of evidence; that A-1, A-2, A-3 and PW-1 in pursuance of criminal conspiracy, on 7/8/2001 abducted deceased Kartikraj by inviting him under the pretext of marriage party of A-1 at Flat No.5 of Amarpali Society, Vadgaon, Pune, detained Kartikraj there and threatened him with death in order to compel his parents to pay ransom; that the prosecution has further proved that A-1, A-2, A-3 and PW-1 in pursuance of the said criminal conspiracy put Kartikraj in fear of death or grievous hurt with the help of firearm viz. country made revolver and deadly weapons, sickle, etc.

in order to commit extortion; that in the intervening night of 8/8/2001 and 9/8/2001 in Flat No.5 of Amarpali Society, A-1, A-2, A-3 and PW-1 in pursuance of the said criminal conspiracy committed murder of Kartikraj by strangulation; that the prosecution has further proved that in pursuance of the said criminal conspiracy, A-1, A-2, A-3 and PW-1 committed murder of Kartikraj, caused disappearance of evidence by cutting the dead body of Kartikraj into pieces and threw the pieces in the Mula river and canal with an intention of screening themselves from legal punishment and that A-1, A-2 and A-3 were found in possession of revolver and four cartridges in contravention of the provisions of section 4 of the Indian Arms Act. In view of these findings, the learned Sessions Judge convicted the accused as aforesaid.

70. We have heard the learned counsel appearing for the accused and the learned A.P.P. With their able assistance, we have gone through the evidence and the record of the case. Mr. Gupte addressed us mainly on the evidence of the approver and the manner in which he was granted pardon and contended that he is not a reliable witness. Mr. Nahar addressed us on medical evidence and contended, inter alia, that the prosecution has miserably failed to prove homicidal death as also the cause of death and, hence, the accused cannot be convicted for the offence of murder. He also pointed out the infirmities in the investigation and contended that the investigation is a tainted investigation. Mr. Jamdar mainly concentrated on

the evidence led by the prosecution to corroborate the approver's evidence and contended that the said evidence is replete with inconsistencies and contradictions and cannot be accepted to lend assurance to the approver's evidence.

71. The learned A.P.P. Ms. Kejriwal has contended that the approver is a reliable witness and there is enough corroboration to his evidence from the evidence on record qua each accused.

72. Before we touch upon the merits of the case we will refer to the judgment of the Supreme Court in ***Kashmira Singh v. State of M.P., A.I.R. 1952 S C 159*** to which our attention is drawn by the learned counsel for the accused. The Supreme Court has held in that case that fouler the alleged crime, stricter must be the proof. Where the murder is particularly cruel and revolting one, it is necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime might induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law. Since the crime involved in this case is heinous and revolting, in view of the above observations of the Supreme Court, while deciding whether the accused are guilty or not, we should not be carried away by the heinous nature of the crime. On the contrary we will have to scrutinise the evidence with more care and caution. We shall keep the

above observations of the Supreme Court in our mind while dealing with this case.

73. The prosecution story rests on the evidence of approver PW-1 Kumar Gaurav. His evidence has come under heavy criticism. Our attention is drawn by Mr. Gupte, the learned counsel to section 133 of the Evidence Act which lays down that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice and also to section 114 of the Evidence Act which provides that the court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Particular emphasis is laid on illustration (b) to section 114 which say that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. It is argued that though a conviction may proceed on uncorroborated evidence of an accomplice as a matter of prudence, the court should seek corroboration to his testimony because being a party to the crime, his evidence is tainted and though he may give a fairly truthful broad outline of the crime it is possible for him to state falsehood as regards involvement of others to save his skin. The evidence of accomplice must be credible and it must get sufficient corroboration in material particulars from independent evidence qua each accused. It is

pointed out that the Supreme Court has repeatedly stated that rule of corroboration must be present in the mind of the judge and in the present case the learned judge has completely lost sight of this. There is no indication in the judgment that he had in his mind the principle that though an accomplice is a competent witness and conviction can rest on his evidence, generally no reliance can be placed on the evidence of an accomplice unless it is corroborated in material particulars. The learned counsel urged that in this case there is intrinsic evidence to establish that the confessional statement is not voluntary, but PW-1 was forced into making it by promising him pardon. In fact on two earlier occasions, he had retracted the confessional statement. It is the result of public and media pressure under which the police were working and, therefore, it is not a voluntary confessional statement. According to the learned counsel the confessional statement of PW-1 is so tainted that no amount of corroboration can make it good because there can be no corroboration to a tainted piece of evidence. In any case even the alleged corroborative evidence is replete with inconsistencies and falsities indicating fabrication of evidence by the police and, hence, no reliance can be placed on the alleged confessional statement. The learned counsel relied on several judgments to which we will soon turn.

74. The learned A.P.P. on the other hand contended that the confessional statement of PW-1 is voluntary. It is recorded after following the guidelines laid down in the High Court Criminal Manual (for short, “the said

Manual"). It inspires confidence and can safely be relied upon without corroboration. But if corroboration is needed it is available in ample measure from other evidence on record. The learned counsel contended that the corroboration required in law is not in respect of every minute detail of the particular case. The evidence of the approver must be corroborated in material particulars. In support of this submission, the learned A.P.P. has also relied on several judgments. We will refer to the judgments cited by both sides because that will indicate the principles which this court will have to keep in mind while appreciating approver's evidence.

75. In ***Bhuboni Sahu v. The King, 1976 Indian Appeals 147***, while dealing with the evidence of an accomplice, it was held by the Privy Council that the courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused. The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue.

76. In several judgments, the Supreme Court has reiterated the same view. In ***Sarvan Singh Rattan Singh v. State of Punjab, AIR 1957 SC 637***, the Supreme Court has held that an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test common to all witnesses. If this test is satisfied, the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. The Supreme Court reiterated that an accomplice is undoubtedly a competent witness under the Indian Evidence Act. There can be, however, no doubt that the very fact that he has participated in the commission of the offence introduces a serious stain in his evidence and the courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence. The Supreme Court clarified that it would not be right to expect that such independent corroboration should cover the whole of the prosecution story or even all the material particulars because if such a view is adopted it would render the evidence of the accomplice wholly superfluous. On the other hand, it would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details because, in such a case, corroboration does not offer the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true. The Supreme Court further observed that if it is found that the approver's account against one of the accused persons is wholly discrepant, this finding itself should inevitably lead the court to

scrutinise his evidence in respect of the other accused persons with greater caution. The Supreme Court also dealt with the situation where there is inconsistency between the approver's evidence in the court and his statement before the police and observed that where the statements made by the approver on subsequent occasions merely added details which were not included in the first statement, it is a different matter. Omissions have not always the same significance as contradictions. But where the two sets of statements are wholly inconsistent and irreconcilable that obviously leads to a very serious infirmity in the character of the witness.

77. In ***The State of Andhra Pradesh v. Cheemalapati Ganeswara Rao and another, AIR 1963 SC 1850***, the Supreme Court observed that "Whether the evidence of the approver should in any given case be accepted or not will have to be determined by applying the usual tests such as the probability of the truth of what he has deposed to, the circumstances in which he has come to give evidence, whether he has made a full and complete disclosure, whether his evidence is merely self exculpatory and so on and so fourth. The court has, in addition, to ascertain whether his evidence has been corroborated sufficiently in material particulars. What is necessary to consider is whether applying all these tests the evidence of the approver should be acted upon.

78. The Supreme Court further pointed out that while it must be shown that the approver is a witness of truth, the evidence adduced in a case cannot be considered in compartments and that even for judging the credibility of the approver, the evidence led to corroborate him in material particulars would be relevant for consideration. The evidence of the approver must not be dealt with in a general way. The court will have to consider for itself the evidence adduced by the prosecution on the specific charges and then to conclude whether charges have been established or not.

79. In ***Bhiva Patil v. State of Maharashtra, AIR 1963, SC 599***, the Supreme Court held that there should be corroboration of the approver in material particulars and qua each accused.

80. In ***Madan Mohan Lal v. State of Punjab, AIR 1970 SC 1006***, the approver had not mentioned the names of the accused in his statement before the police. The trial court disallowed the question put with the object of bringing that omission on record. It was argued that the trial court had committed an error because if that omission had been brought on record, it would have rendered the approver's evidence unreliable. The Supreme Court held that there was nothing to show that the approver in his statement before the Magistrate, who passed the order granting him pardon, had not mentioned the names of the accused and had not referred to the roles played by them as deposed to by them in the trial court. The Supreme Court

observed that it may be that when the approver gave his police statement he did not know that he would be granted pardon and possibly for that reason had not come out with all the facts known to him and he did so while he was making his statement before the Magistrate as he knew by then that he would be granted pardon on condition that he would disclose all the facts known to him. The Supreme Court further observed that the omission in the police statement, therefore, by itself would not have rendered his evidence unreliable. In considering whether the approver's evidence passed the test of reliability, the court would have to consider whether taken as a whole and in the light of the facts and circumstances of the case it was a credible version or not.

81. In ***Dagdu v. State of Maharashtra, (1977) 3 SCC 68***, the Supreme Court reiterated the same principles. On the facts before the Supreme Court, the Supreme Court found the evidence of one of the approvers to be not credible as he had admitted in his evidence that the police had tortured him and he had made several significant statements for the first time in the court. The Supreme Court referred to ***Madan Mohan Lal's case (supra)*** and observed that it is one thing to say that an approver's statement cannot be discarded for the mere reason that he did not disclose the entire story in his police statement and quite another to accept an approver in spite of contradictions which cast a veil of doubt over his involvement of others.

82. In ***Rampal Pithwa Rahidas & Ors. V. State of Maharashtra, 1994 (Supp) 2 SCC 73***, on the facts before it, the Supreme Court observed that while examining the creditworthiness of the approver's evidence, the court will have to inter alia, consider how the approver came to be arrested; how he became a participant in the crime; what role did he play in the crime and when and how he decided to be an approver. In the facts before it, the Supreme Court found that the Investigating Agency had created false evidence; fabricated false clues insofar as testimony of the approver is concerned; his arrest was unnatural; his self-confessed participation in the crime without taking any active part in it was not acceptable and his exculpatory nature of the statement returned an impression that he was a planted witness.

83. In ***Niranjan Singh v. State of Punjab, (1996) 9 SCC 98***, the Supreme Court added that the evidence of the approver must be reliable. There should be corroboration in material particulars and so far as the accused on trial is concerned, the approver must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt.

84. In ***Narayan Chaudhary v. State of Maharashtra, (2000) 8 SCC 457***, the Supreme Court has held that there is no distinction between an accomplice who is or is not an approver. As both have been treated alike, the rule of corroboration applies to both. Accomplice's evidence is taken on

record as a matter of necessity in cases where it is impossible to get sufficient evidence of a heinous crime unless one of the participators in the crime is disposed to disclose the circumstances within his knowledge on account of tender of pardon.

85. In ***K. Hashim v. State of Tamil Nadu, (2005) 1 SCC 237***, the Supreme Court laid down the following principles:

> *"It is not necessary that there should be independent confirmation of every material circumstance.*
>
> *All that is required is that there must be additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.*
>
> *The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particulars the testimony of the accomplice or complainant that the accused committed the crime. This does not mean that the corroboration as to identification must extend to all the circumstances necessary to identify the accused with the offence. Again all that is*

necessary is that there should be independent evidence which will make it reasonably safe to believe the witness's story that the accused was the one, or among those who committed the offence.

The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. But of course the circumstances may be such as to make it safe to dispense with the necessity of corroboration and in those special circumstances, a conviction so based would not be illegal.

The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with crime."

86. Following principles can be deduced from the above judgments. An accomplice is a competent witness and conviction can rest upon his uncorroborated testimony. But, as a matter of prudence, the court should look for independent corroboration to the approver's evidence qua each accused. Corroboration need not be direct, it could be circumstantial.

87. There is no distinction between an accomplice, who is or is not an approver. As both have been treated alike, the rule of corroboration applies to both.

88. An approver has to be a reliable witness. If he is found to be a reliable witness then still his evidence must receive sufficient corroboration. The independent corroboration need not be of every material circumstance. All that is required is that there must be additional evidence rendering it probable that the story of the approver is true and that it is reasonably safe to act upon it.

89. Independent evidence must in some way reasonably connect or try to connect the accused with the crime by confirming in some material particulars the testimony of the approver that the accused committed the crime.

90. If the approver's account is wholly discrepant against one of the accused persons then the court has to scrutinise his evidence in respect of the other accused with greater caution.

91. If the inconsistency between the approver's evidence in the court and his statement before the police only amounts to adding details which were not included in the statement made before the police that would not affect

his credibility. However, if the two statements are wholly inconsistent, it would introduce an infirmity in his evidence.

92. The evidence of the approver should be appreciated by applying the usual test such as probability of the truth of what he has deposed to, the circumstances in which he has come to give evidence, whether he has made a full and complete disclosure and whether his evidence is merely self-exculpatory. Exculpatory nature of his statement would return an impression that he is a planted witness.

93. The evidence of the approver cannot be considered in compartments. It must not be dealt with in a general way. The court will have to consider for itself the evidence adduced by the prosecution on the specific charges and then to conclude whether charges have been established or not.

94. Omissions in the police statement by themselves would not render the approver's evidence unreliable. In considering whether the approver's evidence passed the test of reliability, the court would have to consider whether taken as a whole and in the light of the facts and circumstances of the case, it was a credible version or not. If there are serious contradictions that would, however, cast a veil of doubt over his involvement of others.

95. While considering the creditworthiness of the approver's evidence, the court will have to consider, inter alia, how the approver came to be arrested, how he became a participant in the crime, what role did he play in the crime and when and how he decided to become an approver.

96. From the judgments of the Supreme Court, it is evident that the prosecution has to first prove that the approver is a reliable witness. Voluntary nature of statement would be one indication of reliability. Mr. Gupte, the learned counsel appearing for the accused contended that the police have forced PW-1 to confess. He had retracted his confessional statement on two earlier occasions. This shakes his credibility and creates doubt about the voluntary nature of his confessional statement. It was submitted that PW-1 was arrested on 13/8/2001. Thereafter, he was kept in a separate lock-up where the police and even the Special Public Prosecutor kept visiting him obviously to force him to make a confessional statement.

97. Our attention was drawn to Ex-33, which is a letter dated 29/10/2001 addressed by PW-1 to the Commissioner of Police, Pune City, stating that on 8/8/2001, he and his companions have committed murder of Kartikraj and expressing desire to confess before the court. On 31/10/2001, he was produced before the J.M.F.C., Pune at 2.00 p.m. His preliminary statement was recorded. He was again produced before the Magistrate on 1/11/2001

at 2.00 p.m. when he again expressed his willingness to confess. The learned Magistrate then recorded his confessional statement.

98. It was pointed out that on 6/11/2001, PW-1 had addressed a letter to the J.M.F.C., Pune, complaining of police ill treatment with a view to forcing him to become an approver. Again on 18/2/2002, PW-1 addressed another letter to the Sessions Judge, Pune, stating that on his letter dated 6/11/2001 no action is taken by Shri Rathod, the J.M.F.C. It is further stated in this letter that his statement was recorded in the presence of the J.M.F.C. under promise, threat and pressure. By this letter, PW-1 retracted his statement dated 1/11/2001. Though in the court he denied that he ever sent this letter and contended that it was not in his handwriting and he had not signed it, in his letter dated 18/2/2002 he has stated that he had sent letter dated 6/11/2001. The learned counsel contended that, therefore, PW-1's case that letter dated 6/11/2001 was not sent by him is false. Our attention is also drawn to PW-54, J.M.F.C. Shri Rathod's evidence, where Shri Rathod has admitted that he had received the said letter and because there was complaint of police ill-treatment he had issued production warrant. Relying on this evidence, it is argued that this also falsifies PW-1's case that the said letter was not sent by him.

99. The learned counsel further argued that if PW-54 Shri Rathod had received this letter, it was obligatory on him to find out whether what was

stated in the letter was true. PW-54 Shri Rathod has not taken quick action and though he has stated that on 1/11/2002 PW-1 was produced before him, there is no evidence to establish that. In fact, in roznama dated 1/1/2002, PW-1 (then A-3) was shown absent. The learned counsel urged that it is very clear that PW-1's retraction was not considered by the J.M.F.C.

100. It is further contended that the case of the prosecution that PW-1 addressed another letter to the District and Sessions Judge, Pune dated 3/4/2002, which is at Ex-12, retracting his confession and stating that he had made the application on 18/2/2002 due to pressure from his father appears to be untrue. PW-1 seems to have been forced to write this letter. Support is drawn from Ex-52 which is a diary extract written by PW-1. PW-1 has admitted in his evidence that the said extract is written by him. It is necessary to reproduce the gist of the said extract as the defence has heavily relied on it. This extract appears to have been written on 27/2/2002. In this noting made by PW-1, he has stated that on 27/8/2001 he was produced before J.D. Pawar and Hiremath by Inspector Jadhav and they were told that he is an approver. Thereafter, he was kept in "after yard" and he was under watch. On 12/9/2001, Shinde and Lotlikar came to meet him. On 7/9/2001, Jadhav had given him a letter in the lock-up and asked him to send it to the court. It was confiscated at the gate. On 12/9/2001, there was a talk of sending the letter. On 19/9/2001, J.D. Pawar told him that he should write a letter like the one which was confiscated at the gate. He wrote a letter and

gave it to Yard in-charge and asked him to send it. Yard in-charge, accordingly, sent it. On 20/9/2001 Shinde asked him whether the letter was sent or not. On 15/10/2001, again he was asked to send a letter. On 29/10/2001 Nikam and Dilip Shinde came to meet him. He was kept in a separate room and he was made to write a letter. On 31/10/2001, he was produced before the judge. The judge adjourned the matter to the next day. He was taken to the lock-up. Then he was taken to the Crime Branch and, till late night, his statement was explained to him. He was sent to jail at 8.00 p.m. On 1/11/2001, he was taken to the Crime Branch. Then at 3.00 p.m., he was taken to the court where his statement was recorded for five hours. On 5/11/2001, Lotlikar came to meet him and he gave him Osho books. On 8/12/2001 or 9/12/2001, Shinde and Nikam came to meet him. They told him that the application will be made in the court. On 26/2/2002, Shinde and Lotlikar came in the evening to meet him. Below this extract, there is one note. It is stated that entry is made in the register in respect of those who come to the jail. All officers were told that he was an approver. He was threatened by the police and the letters were got written from him. That is why he gave his statement. It is further stated that this will be established by the entry made about them and it is evident that the police are playing a game because he was detained separately in a lock-up and he was under surveillance of special guard.

101. On the basis of this diary entry, it is argued that confessional statement is far from voluntary and even letter dated 18/2/2002 is the outcome of police persecution.

102. Mr. Gupte contended that while recording the confessional statement, JMFC has not followed the procedure laid down in the said Manual. He submitted that the guidelines/instructions contained in the said Manual though are not statutory will have to be consistently followed to ensure a fair recording of the confessional statement. Mr. Gupte contended that inasmuch as the JMFC has not followed the procedure, no reliance can be placed on the confessional statement. He drew our attention to ***Vilas Patil v. State of Maharashtra, 1996 Cri.L.J. 1854,*** where this court was dealing with identification parade evidence. It was argued that the identification parade was held in breach of the instructions issued by the High Court in the said Manual. This court observed that the instructions contained in the said Manual issued by the High Court for conducting identification parade are not statutory but have been consistently followed to ensure a fair identification. The identification parade evidence was not relied upon because the identification parade was held in breach of the said instructions. Mr. Gupte then relied upon the judgment in ***Sanjiv Jadav v. State of Maharashtra, 1997 All.M.R.. (Cri.) 197.*** In that case, again this court was dealing with identification parade evidence. The Magistrate had not followed the guidelines contained in the said Manual. He had not

testified that there was no opportunity for identifying witnesses and the accused to see each other before the parade. This court observed that the guidelines contained in the said Manual cannot be violated and should be followed scrupulously. In view of the breach of the guidelines, this court refused to accept the identification parade evidence and acquitted the accused. Mr. Gupte contended that on a parity of reasoning, the breach of the guidelines pertaining to the recording of the confessional statement would be fatal and this court, therefore, should place no reliance on the confessional statement of PW-1.

103. It was also contended that in the application dated 30/10/2001, submitted by P.I. Shinde to the J.M.FC., it was mentioned that accused - Kumar Gaurav is an important witness. This shows that the decision was already taken by the police to make PW-1 an approver and it was not the voluntary decision of PW-1. It was further argued that in application (Ex-7) dated 21/3/2002 filed in the Sessions Court under section 307 of the Code, praying that pardon be granted to PW-1, it is not stated that PW-1 had twice retracted his confessional statement and, therefore, the learned Sessions Judge has also not considered this aspect. His exercise of discretion is therefore not proper. It was also pointed out that Kartikraj's murder was given great publicity. There was a lot of media and public pressure on the police and, therefore, under extreme pressure of media and public, the

police forced PW-1 to become an approver. His evidence, therefore, deserves to be rejected. His evidence is not reliable.

104 We will, now, examine whether PW-1's confessional statement is voluntary or not. PW-1 was arrested on 13/8/2001. He was produced before J.M.F.C. on 14/8/2001. His statement under section 161 came to be recorded on 14/8/2001. In his evidence, he has stated that he returned to Yervada jail on 27/8/2001. He was repenting for what he had done and he thought that he should disclose everything to the court. Hence, he sent letter dated 29/10/2001 to the Commissioner of Police, Pune, stating that he wanted to make a confessional statement (Ex-33). He was produced on 31/10/2001 in J.M.F.C. (AC) court. He was asked by the Magistrate why he was giving confessional statement. He told him that he was repenting for what he had done and he wanted solace and, therefore, he was giving statement. He was asked whether he was threatened by the police or whether he was lured by the police, he answered in the negative. He was told that the confessional statement could be used against him as evidence. He told the Magistrate that he was aware about it. He was asked whether he was willing to have talk with his relatives or advocate before giving statement. He answered in the negative. The Magistrate gave him 24 hours to reflect on his confessional statement. On 1/11/2001, he was again produced in the court. He was again asked some questions. He repeated same answers. His statement was recorded between 2.00 p.m. and 7.30 p.m.

It was read over to him and thereafter his signature was obtained thereon. At the foot of that statement, Ex-34, he wrote in his own handwriting that he had gone through it and found it to be correct and that the confessional statement was given by him voluntarily.

105. We have carefully read Ex-33 and Ex-34. We have also gone through the relevant guidelines set out in the said Manual as regards recording of confessional statement. We have also read the evidence of PW-54 Shri Rathod, the J.M.F.C. which corroborates the evidence of PW-1 as regards recording of confessional statement. We are unable to accept Mr. Gupte's submission that the confessional statement must be kept out of consideration because the J.M.F.C. has not followed the guidelines of the said Manual. First of all, we do not find that there is any violation of the guidelines. We feel that the JMFC had meticulously followed the procedure. The only allegation which is levelled by the defence is that after his statement was recorded on 31/10/2001, PW-1 was taken to the crime branch though as per the guidelines, he should not have been taken to the police custody. PW-1 has specifically denied this in paragraph 88 of his evidence. Therefore, we will not accept the case of the defence that he was taken to the crime branch after his confessional statement was recorded. Besides though the said guidelines have to be consistently followed, some lapses would not vitiate the recording of confessional statement if there is clear indication that most of the guidelines are followed. These guidelines

are not mandatory. In ***State of Maharashtra v. Suresh, 2000 All MR (Cri.) 554,*** the Supreme Court was dealing with a similar contention urged on behalf of the accused as regards breach of guidelines pertaining to holding of identification parade. The High Court had brushed aside the identification parade evidence on the ground that the Executive Magistrate had not strictly followed the said guidelines. The Supreme Court observed that if potholes were to be ferreted out from the proceedings of the Magistrate holding such parade, possibly no such identification parade can escape without one or two lapses. If a scrutiny is made from that angle alone and the result of the parade is treated as vitiated, every test identification parade will become vitiated. The Supreme Court observed that the High Court niggled on unimportant details and came to the wrong conclusion that the test identification parade was irretrievably vitiated. It is clear therefore that the guidelines contained in the said Manual have undoubtedly to be followed but some lapses here and there would not be fatal. If there were rampant breaches of the guidelines, we would have taken note of that. But such is not the case here. In fact we find that there are no breaches of the guidelines. We, therefore, reject this submission of Mr. Gupte.

106. It was argued that in letter dated 30/10/2001 addressed to J.M.F.C., Ex-275 requiring him to record confession of PW-1, the investigating officer has described him as an important witness. Therefore, the decision

to make him approver was already taken. We do not find any illegality in this. This statement only reflects the investigating agency's reasonable prognosis of the future of the case it was handling after PW-1 expressed his desire to confess. Nothing much can be read into it.

107. We have seen letter dated 6/11/2001. In this letter purportedly written by PW-1, he has stated that his confessional statement was recorded under pressure and threats. He has retracted his confessional statement dated 1/11/2001. When this letter was shown to PW-1 in the court, he denied its contents. He denied that it was in his handwriting and that it bore his signature. He has further stated that on that day he was in jail and this letter does not bear seal or signature of jail authority. In the circumstances, it was marked as Article "B".

108. So far as letter dated 18/2/2002 is concerned while admitting that it is in his handwriting, PW-1 has stated that he wrote it under the pressure of his father. According to him, his father told him that he was receiving threats and entire family life was disturbed thereby and the family will not live a happy life unless he retracts his confessional statement. As regards reference to letter dated 6/11/2001 in his letter dated 18/2/2002, he has stated that letter dated 18/2/2002 itself was sent by A-1 to him as per say of A-1's father and that is why there is a reference to letter dated 6/11/2001 in such a manner in that letter. It is pertinent to note that PW-1 has thereafter

sent letter dated 3/4/2002 (Ex-12) addressed to the District and Sessions Judge, Pune, in which he has stated that he had never sent application/letter dated 6/11/2001 to J.M.F.C. Shri Rathod and he had sent application/letter dated 18/2/2002 due to pressure of his father. He has stated that he does not want to retract his confession. He has made it voluntarily without pressure or promise being offered by anyone. In his cross-examination, he has denied the suggestion that he was pressurised by the police after 27/2/2002 and they made him write letter dated 3/4/2002.

109. To us, PW-1's explanation appears to be acceptable. PW-1 and the accused hail from Bihar. It appears that after PW-1's confessional statement was recorded, PW-1's family received threats and, therefore, his father asked him to retract his confessional statement. It appears that there was pressure on him to retract confessional statement. PW-1 has denied the signature and handwriting and contents of letter dated 6/11/2001. Moreover, even the suggestion of the defence is that it was written by one Sony on his instructions which he has denied. There is no reason for us to disbelieve him. It is significant to note that he has candidly admitted that letter dated 18/2/2002 bears his signature. He has also admitted that diary extract (Ex-52), to which we shall soon turn, to be in his handwriting. This extract also contains certain averments indicating police pressure. If he can admit letter dated 18/2/2002 as having been signed by him and Ex-52 being in his handwriting, there was no reason for him to deny his signature on

letter dated 6/11/2001. He is not a witness who is out to deny everything. In any case, his subsequent letter dated 3/4/2002 in which he has categorically stated that his confessional statement is voluntary, puts the entire controversy at rest. It is true that PW-54 J.M.F.C. Shri Rathod has stated that he had issued a production warrant on letter dated 6/11/2001. Shri Rathod has stated that pursuant to this warrant, PW-1 was produced before him on 1/1/2002 and when he enquired with him, PW-1 stated that the letter dated 6/11/2001 was not sent by him. He denied its contents. It is true that there is no clear record to show that PW-1 was produced before Shri Rathod. But once we accept PW-1's case that he had not sent letter dated 6/11/2001, it is not necessary to go into the question of his production before Shri Rathod.

110. We have already referred to Ex-52, the diary extract and reproduced its contents. This extract is dated 27/2/2002. It was produced by the defence and during cross-examination, it was shown to PW-1. He admitted that it is in his handwriting. No questions were asked as regards its contents. PW-1 was not asked whether he was admitting contents of Ex-52. Though PW-1 was not asked any question about the contents of the extract in the cross-examination, many of the averments made in this extract are denied by him. He has denied that he was produced before Hirmath and J.D. Pawar by PSI Jadhav. He has denied that the officers from crime branch had been to Yervada prison on 29/10/2001. He has stated that he

returned to Yervada prison on 31/10/2001 at about 6.30 to 7.00 p.m. He has denied that he was taken to crime branch till late in the evening and explained his statement and, thereafter, taken to jail at about 8.00 p.m. He has further denied the suggestions that a story was concocted by officers before 27/8/2001; that he was assured by the police officers that they would see that he was given status of approver; that PSI Jadhav declared amongst jail officers that he was the approver; that he was kept under strict supervision in the jail; that he was being watched whenever visitors used to come to meet him and his letters were strictly censored. He has further denied the suggestion that investigating officers had been to him in jail and that draft Ex-31 was supplied to him by the police. He has also denied that Bendre was allowing him to have separate conference in the jail. On account of these denials, the accused can draw no support from Ex-52. Besides, on 3/4/2002, he has reaffirmed that his confessional statement is voluntary. If PW-1 wanted to make any grievance about the police or recording of his confessional statement, he would have done so on 2/9/2002 in the court when his evidence was being recorded. On that day, he has reaffirmed the contents of Ex-12, letter dated 3/4/2002.

111. Moreover, we find substance in the learned A.P.P.'s submission that PW-1 has admitted the handwriting but not the contents of Ex-52. In ***Om Prakash Berlia & Another v. Unit Trust and Others, AIR 1983 Bom. 1***, a learned single judge of this court (Bharucha, J.) has held that the expression

`the contents of a document' found in section 61 of the Evidence Act means what the document states, and not the truth of what the document relates. The truth of the contents of the document, even prima facie, cannot be proved by merely producing the document for the inspection of the court. What it states can be so established. The writer of a document is required to depose about the truth of its contents. Where the party tendering the document finds it necessary to prove the truth of its contents, that is the truth of what it states, he must do so in the manner he would prove a relevant fact. Truth of the document must be separately established. In ***Sait Khimchand v. Yelmarti Satyam & Others, AIR 1971 SC 1865***, the Supreme Court has held that mere marking of a document as an exhibit does not dispense with its proof.

112. In this case, PW-1 has admitted the handwriting. No questions were put to him specifically about the contents. In fact, as already stated by us, a number of averments of Ex-52 are denied by him and, therefore, this document does not help the accused. We are also inclined to accept the learned A.P.P.'s argument that there was no reason for PW-1 to make such a detailed diary entry, giving such a sequence of dates which would coincide with his confessional statement made in the court. The manner in which it is written creates an impression that it is aimed at destroying the effect of confessional statement. Against the background of the threats given to PW-1's family about which he has deposed in the court and the fact

that it has come from the custody of defence and the fact that he has denied major portions of this document, we feel that the trial court has rightly not given any importance to it. Ex-53 is also admittedly in the handwriting of PW-1. It was also produced by the defence. It contains certain notes which indicate that there were some efforts to contact the witnesses to win them over. It does not bear any date. It is not signed by PW-1. It may be that it was written even prior to the confessional statement. Therefore, in our opinion, it is not necessary to take it into consideration. It is also suggested by the defence that Special Public Prosecutor Mr. Nikam had met PW-1 in the jail to prepare him for confessional statement. In the absence of any clear evidence to that effect, it is not possible for us to accept this case of the defence. We are of the opinion that PW-1 has voluntarily made confessional statement. He was forced to retract it. But by his letter dated 3/4/2002, he reaffirmed his confessional statement and in his evidence in the court, he again made a truthful disclosure.

113. In any case assuming PW-1 has retracted his confessional statement, we find no difficulty in placing reliance on it because there is no prohibition in law which forbids us from doing so. A retracted confessional statement can always be relied upon if it is found to be true and corroborated in material particulars by other evidence on record. In ***Bheru Singh S/o Kalyan Singh v. State of Rajasthan, 1994 (2) S C C 467***, the appellant had retracted his confessional statement

recorded under Section 164 of the Code. The High Court found it to be voluntary. The High Court also found that there was sufficient corroboration for the retracted confessional statement. The High Court confirmed the conviction of the appellant and the sentence of death imposed upon him. Before the Supreme Court it was argued that since the confessional statement was retracted it cannot form the basis of conviction.

114. The Supreme Court repelled this contention and held that it was satisfied that the learned magistrate had taken all necessary precautions to ensure that the appellant had sufficient time to retract before he made confessional statement and that he was not in fear or threat or allurement before appearing in the court. The Supreme Court observed that the caution envisaged by Section 164 of the code was properly administered to the appellant and he was told that he was not bound to make the statement and that if he did make it, it can be used against him. The Supreme Court observed that there was sufficient corroboration available on record, both direct and circumstantial to the voluntary confessional statement of the appellant recorded under Section 164 of the Code, even though retracted at the trial. The Supreme Court upheld the conviction and sentence of death imposed upon the appellant.

115. In ***K. I. Pavunny v. Assistant Collector (HQ.) Central Excise Collectorate, Cochin, 1997 (3) SCC 721***, after referring to relevant cases on the point the Supreme Court held that there is no prohibition under the Evidence Act to rely upon the retracted confession to prove the prosecution case or to make the same basis for conviction of the accused. Practice and prudence require that the court would examine the evidence adduced by the prosecution to find out whether there are any other facts and circumstances to corroborate the retracted confession. It is not necessary that there should be corroboration from independent evidence adduced by the prosecution to corroborate each detail contained in the confessional statement. The court is required to examine whether the confessional statement is voluntary; in other words whether it was not obtained by threat, duress or promise. If the court is satisfied from the evidence that it was voluntary then it is required to be examined whether the statement is true. If the court on examination of the evidence finds that the retracted confession is true that part of inculpatory portion could be relied upon to base the conviction. However, the prudence and practice require that court would seek assurance getting corroboration from other evidence adduced by the prosecution. Since the Supreme Court was referring to retracted confession of an accused it clarified that as regards corroboration, burden is not so high on the prosecution as in case of an approver and high degree of proof and probative value is insisted in capital offence.

116. It is evident, therefore, that the retracted confessional statement of an approver can also form the basis of conviction, if on examination of the evidence, the court finds that it is true. Even inculpatory portion could be relied upon to base the conviction, if there is corroboration from other evidence on record as to the material portion of the prosecution story and qua each accused. Since in this case, we are concerned with confessional statement of an approver and this is a case involving capital offence, the burden on the prosecution is obviously high but there can be no dispute about the proposition that conviction can be based even on retracted confessional statement of an approver, if it is found to be true and is corroborated in material particulars by other evidence on record qua each accused.

117. Therefore, assuming the confessional statement is retracted by PW-1, in view of the above legal position, if we find it to be true and believable as a matter of prudence, we shall find out whether there is any corroboration to the material aspect of the prosecution story as deposed by him from other evidence on record qua each accused and if such corroboration is present there would be no difficulty in relying on it.

118. It is time and again suggested that the police forced PW-1 to make a confessional statement because the crime was gruesome and there was lot of pressure on them from the public, media and their superiors. We do not find any basis for this argument in the record. The complaint was registered on 9/8/2001 and the accused came to be arrested on 13/8/2001. The detection of crime was quick. Therefore, there was no question of there being any public wrath. Besides, there is no concrete evidence to that effect. Merely suggestions are put to the witnesses, which are denied. The newspaper cutting shown to us is of 14/8/2003. Besides, it is not exhibited and, hence, cannot be taken note of. In view of this, we are not inclined to accept the argument that the police have forced PW-1 to confess with a view to fabricating evidence because of media hype or public pressure.

119. It was further argued that in application dated 21/3/2002 filed in the Sessions Court under section 307 of the Code, praying that pardon be tendered to the accused, it is not stated that PW-1 had twice retracted his confession. It is true that in this application (Ex-7) the said fact is not mentioned. However, the order passed by the Additional Sessions Judge, Pune dated 3/4/2002 indicates that this fact was pointed out to the learned judge and after applying his mind to this circumstance, the learned judge has passed the order. He has stated that before proceeding to decide this application, he had enquired with the accused whether he is prepared to make a full and true disclosure of the whole circumstances within his

knowledge regarding this offence and the entire incident involved and whether he is ready to accept tender of pardon. The accused in clear terms admitted that he is ready to disclose all facts within his knowledge and he is ready to accept pardon. Therefore, the order granting pardon cannot be attacked on the ground that the learned judge while passing it was oblivious of any vital circumstance.

120. Mr. Gupte drew our attention to the application dated 21/3/2002 filed by PW-53 Dilip Shinde in the Sessions Court at Pune under section 307 of the Code praying for the grant of pardon to PW-1. Mr. Gupte contended that it is stated in this application that the role of PW-1 (accused Kumar Gaurav) was comparatively lesser than that of the other accused. Mr. Gupte submitted that it is a factually wrong statement. PW-1 has played a major role. Therefore, the learned Sessions Judge was not apprised of the correct facts. He was misled and that has resulted in improper exercise of discretion by him.

121. We are unable to agree with Mr. Gupte. The role played by the accused can never be the consideration for grant or refusal of pardon. All that the learned judge has to consider is whether the person to whom pardon is to be granted wants to make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. It is only on that condition pardon can be granted. Once that condition is satisfied, order

granting pardon will have to follow because it is sought by the prosecuting agency with a view to obtaining evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence. The learned Judge cannot go into the aspect of the nature of his involvement or possible weight of his evidence.

122. In ***Lt. Commander Pascal Fernandes v. State of Maharashtra and others, AIR 1968 SC 594***, the Special Judge had suo motu without being invited by the prosecution to consider the tender of pardon to one of the accused before him, tendered conditional pardon to one of the accused. It was argued that the Special Judge could not have done so. While dealing with this question, the Supreme Court observed that ordinarily it is for the prosecution to ask that a particular accused, out of several, may be tendered pardon. But even where the accused directly applies to the Special Judge he must first refer the request to the prosecuting agency. It is not for the Special Judge to enter the ring as a veritable director of prosecution. The power which the Special Judge exercises is not on his own behalf but on behalf of the prosecuting agency and must, therefore, be exercised only when the prosecution joins in the request. The Supreme Court further observed that the State may not desire that any accused be tendered pardon because it does not need approver's testimony. It may also not like the tender of pardon to the particular accused because he may be the brain behind the crime or the worst offender. The proper course for the Special

Judge is to ask for a statement from the prosecution on the request of the prisoner. If the prosecution thinks that the tender of pardon will be in the interests of a successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, it will indubitably agree to the tendering of pardon. The Special Judge or the Magistrate must not take on himself the task of determining the propriety of tendering pardon. In the circumstances of the case, the Supreme Court found fault with the learned Special Judge as he did not bear these considerations in mind and took on himself something from which he should have kept aloof. The Supreme Court observed that all that he should have done was to have asked for the opinion of the public prosecutor on the proposal.

123. We may also refer to yet another judgment of the Supreme Court in ***Jasbir Singh v. Vipin Kumar Jaggi & Ors., 2001 SCC (Cri.) 1525.*** In that case the Supreme Court was dealing with the question of granting pardon to a witness who was a convicted offender. The Supreme Court reiterated the same principle and held that it is for the prosecution to decide the necessity of granting pardon to an accused and if it so decides, the court has to agree to tendering of pardon. In that case, the Supreme Court referred to its judgment in ***Lt. Commander Pascal Fernandes 's case*** **(supra)** and observed that although the power to actually grant the pardon is vested in the court, obviously the court can have no interest whatsoever in the outcome nor can it decide for the prosecution whether a particular

evidence is required or not to ensure the conviction of the accused. That is the prosecution's job. In view of this, the Supreme Court found that the order of the Sessions Judge refusing pardon to respondent 1 therein, even though it was actively canvassed for by the public prosecutor, was wrong. It was not for the Sessions Judge to have considered the possible weight of the approver's evidence, even before it was given. In view of these judgments, it cannot be urged that in the application for pardon made before the learned Sessions Judge, the prosecution had made a wrong averment that PW-1 had played a lesser role and, therefore, the discretion exercised by the learned Sessions Judge is vitiated. Whether the approver had played a lessor or greater role is immaterial. It is for the prosecution to examine this aspect from the point of view of the interest of the case. It is the prerogative of the prosecution. The learned Sessions Judge could not have gone into that aspect prior to granting of pardon. All that he had to consider was whether PW-1 was desirous of making a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned. Once the Sessions Judge was satisfied about this, then without going into the nature of the role played by PW-1, he had to grant him pardon. After pardon is granted and he is examined as a witness, his evidence will have to be examined keeping in view the guidelines laid down by the Supreme Court. If it is totally exculpatory, the court may reject it. But prior to that, his alleged role must not weigh with the judge. The averment in the application made before the Sessions Judge

under section 307 of the Code about the role played by PW-1 would therefore not affect the prosecution case adversely. This submission of Mr. Gupte must fail.

124. Relying on observations of the Supreme Court in ***Rampal Pithwa's case (supra)***, it was argued by Mr. Gupte that immediately after the Sessions Court granted pardon to PW-1, in compliance with sub-section (4) (a) of section 306 of the Code, it should have examined him, before examining him at the trial. The same question was dealt with by the Supreme Court in a later judgment in ***A. Deivendran v. State of T.N., AIR 1988 SC 2821***. After referring to the relevant provisions of the Code and the judgments, the Supreme Court clarified that if an accused is tendered pardon after the commitment, by the court to which the proceeding is committed in exercise of powers under section 307 then in such a case the provisions of sub-section 4 of section 306 are not attracted. Significantly, the Supreme Court referred to its earlier judgment in ***Rampal Pithwa's case (supra)*** also. In ***Narayan Choudhary v. State of Maharashtra, (2000) 8 SCC 457***, the Supreme Court has again held that while granting pardon under section 307, that is at post-commitment stage, the trial court is obliged to comply with the requirement of Section 306(1) and not with the requirements of section 306(4). In this case, we have a similar fact situation as was present before the Supreme Court in ***Deivendran's case (supra)***. We therefore, reject this argument of Mr. Gupte.

125. It was argued that the police have lured the approver into making the confession by promising him pardon. The story that he was remorseful or penitent is false. We find no substance in this submission. It is not necessary that a witness has to be remorseful or penitent before he takes a decision to become an approver. Hope of pardon, undoubtedly is what in most cases, makes the witness become an approver. In ***The State of Andhra Pradesh v. Cheemalapati Ganeswara Rao and another, AIR 1963 SC 1850***, the Supreme Court was dealing with a case, where the High Court had held that before reliance could be placed upon the evidence of the approver it must appear that he is a penitent witness. Finding fault with the High Court, the Supreme Court observed "That, in our opinion, is not the correct legal position. The section itself shows that the motivating factor for an approver to turn, what in England is called "King's evidence" is the hope of pardon and not any noble sentiment like contrition at the evil in which he has participated. Whether the evidence of the approver should in any given case be accepted or not will have to be determined by applying the usual tests such as the probability of the truth of what he has deposed to, the circumstances in which he has come to give evidence whether he has made a full and complete disclosure, whether his evidence is merely self exculpatory and so on and so fourth. The court has, in addition, to ascertain whether his evidence has been corroborated sufficiently in

material particulars. What is necessary to consider is whether applying all these tests the evidence of the approver should be acted upon".

126. In the facts of this case, we do not find that the police have forced PW-1 to become an approver. But, in view of the above judgments of the Supreme Court, if the hope of pardon has led him to confess that cannot be frowned at.

127. Mr. Gupte, the learned counsel pointed out that PW-1 was involved in Samastipur bomb blast case. He has antecedents and, therefore, no reliance can be placed on him. According to the learned counsel, looking to his background, it is possible that to save his skin, he is falsely involving others. It appears that PW-1 was involved in some criminal case. However, assuming it is so, his testimony cannot be discredited on that ground if, upon reading his evidence in this case, we find that he is a truthful witness. In ***State of Punjab v. Wassan Singh & Ors., AIR 1981 SC 697***, the Supreme Court has held that persons with questionable antecedents are not necessarily untruthful witnesses. All that is necessary is to scrutinise their evidence with more than ordinary care and circumspection with respect to the part or role assigned to each of the accused. PW-1 being an approver, we are bound to first find out whether he is a credible witness and if we find that he is a credible witness, we will have to further find out whether there is any corroboration to the material aspect of his evidence from the other

evidence qua each of the accused. His antecedents will at the most require us to be more careful and circumspect in accepting what he is saying. But, merely because he has antecedents, we cannot stamp him as an untrue witness.

128. We have already referred to the observations of the Supreme Court in ***Rampal Pithwa's case (supra)*** that if the approver's statement is of exculpatory nature that would return an impression that he is a planted witness. In this case, it is impossible to hold that PW-1's statement is exculpatory. He has clearly admitted his role in the conspiracy. He has stated that in Kudale Patil Angan Apartment of Dodake, they hatched the conspiracy. He agreed to the plan suggested by A-1. In fact, on the dictation of A-1, he prepared the list of articles required for executing the plan to kill Kartikraj. He has admitted that he had gone to purchase the required weapons and articles. He has admitted that he had made threatening calls to Kartikraj's family on his mobile. He participated in tying the hands of Kartikraj. He also participated in the disposal of the parts of Kartikraj's body. He has admitted that after Kartikraj was murdered and his body was disposed of, he on his own made a call to Kartikraj's father and enquired about the ransom. One cannot describe this statement as an exculpatory statement so as to return an impression that PW-1 is a planted witness.

129. The learned counsel for the accused contended that PW-1 being an approver, he must necessarily pass the test of credibility, if conviction is to rest on his evidence. Drawing our attention to various omissions and discrepancies in the evidence of PW-1, the learned counsel contended that no reliance can be placed on such a witness.

130. We have carefully gone through all the extracts of omissions which have been marked by the trial court. We have also seen the inconsistencies or discrepancies in his evidence. We are of the opinion that they do not affect the core of PW-1's evidence. We will have to briefly refer to them as the learned counsel for the accused have dealt with them extensively to discredit PW-1.

131. It was pointed out to us that in the police statement, PW-1 has stated that they had alighted at Kurla Railway station at 6.00 p.m. on 1/8/2001, while in the court he has stated that on 1/8/2001, their train reached Kalyan and when the train halted near Kalyan outer signal, they alighted from the train and went to Kalyan Railway station. Further, it is pointed out that while in his police statement, PW-1 has stated that A-3 had contacted A-1 from Kurla station on phone, in the court he has stated that A-2 contacted A-1 on phone from Shivaji Nagar Police station. It was strenuously contended that these two versions are totally contradictory and they falsify the prosecution case that PW-1, A-2 and A-3 came to Pune by Sahyadri

Express at about 10.30 p.m. It was pointed out that PW-1 has said that the train was delayed by two hours. Relying on railway time table, it is urged that the arrival time of the train at Kurla was 7.30 p.m. On account of delay it must have reached Kurla by 9.30 p.m. In that case, it was impossible for PW-1 and the accused to reach Pune by 10.30 p.m.

132. It is not possible to accept this submission. It is true that there is inconsistency as regards the place where they got down. But that appears to be because PW-1 was confused about the names of the stations Kalyan and Kurla. But because of this, his entire evidence cannot be discarded. PW-6 Shravan Gupta and PW-9 Kamal Prashun's evidence establishes that the accused did reach Pune on 1/8/2001 at about 10.30 p.m. PW-6 Shravankumar Gupta was working as a watchman in Popular Heights Society at Koregaon Park, Pune at the relevant time. He has stated in his evidence that A-1 was known to him as he was frequently visiting the society and he used to reside with PW-9 Kamal Prashun. According to him, on 1/8/2001, he visited the Society with three persons. A-1 entered their names in the register as Prakash, Navin and Ramesh. He identified the entries at Sr.No.38, 39 and 40 collectively marked as Ex-68 in the Register Article I. In the identification parade, he identified PW-1 and A-1.

133. PW-9 Kamal Prashun has stated that A-1 is his relative. He has asserted that on 1/8/2001, A-1 had come to his flat at 11.00 a.m. with his

three friends and they stayed in his flat till 7.30 to 8.00 a.m. of 3/8/2001. Kamal Prashun being relative of A-1 and there being no enmity between him and A-1, Kamal Prashun's evidence must be accepted as truthful. Since PW-1 and the accused stayed in his house for a considerable time, he could identify A-2 and A-3 by their faces in the court. He could identify PW-1 in the court as well. The evidence of Shravan Gupta and Kamal Prashun proves that PW-1 and the accused did go to Pune on 1/8/2001 at about 10.30 p.m. The discrepancy regarding Kalyan and Kurla does not discredit PW-1.

134. A slight discrepancy in the evidence of these two witnesses have been pointed out to us. Shravan Gupta (PW-6) has stated that PW-1 used to visit the society along with A-1, but Kamal Prashun (PW-9) has stated that A-1 was not visiting his place with his friends. It is also not the case of PW-1 that he know A-1 and he used to visit Kamal Prashun's house prior to 1/8/2001. Shravan Gupte has obviously made some addition in cross-examination. His evidence cannot be discarded on that ground. His evidence is supported by register of the society. We are unable to come to a conclusion that the police have fabricated the record. As held by the Supreme Court in ***State of U.P. v. M.K. Anthony, AIR 1985 SC 48***, cross-examination is an unequal duel between a rustic and a refined lawyer. If the evidence read as a whole appears to have a ring of truth and the trial court forms opinion about its general tenor, unless there are weighty reasons, the

appellate court cannot reject it. In our opinion, the discrepancy pointed out is too trivial and does not touch the core of the prosecution case.

135. Rest of the omissions or inconsistencies are totally insignificant. It appears that in his police statement, PW-1 has stated that A-1 stated that he will go and ascertain when he was going to receive possession of the flat and thereafter he left the flat. In the court he has stated that A-1 contacted his agent and asked him about his flat. There is hardly any inconsistency here. Similarly, in his police statement, he has stated that they told A-1 that if the plan goes wrong, police would arrest them. But, this is not found in his evidence. The absence of this statement in the evidence is also inconsequential.

136. In his police statement, PW-1 has stated that from Lonavala, they returned to Chinchwad Railway station and therefrom they went to Pimpri in six seater rickshaw. However, in the court, he has stated that they took a train for Lonavala at 9.30 in the morning. From Lonavala they went to Khandala, selected a place where bag containing money could be received and then they returned to Pimpri. There is not much of variance in this. What clearly emerges is that from Lonavala, they ultimately went to Pimpri. Pimpri has significance because from there they purchased weapons. Therefore, at the most it could be said that in the court PW-1 has made some addition. But there is no inconsistency.

137. In his police statement, PW-1 has stated that after alighting from bus in the evening A-1 told A-2 and A-3 that they should go to ironsmith whose shop is situated beneath the bridge of super highway and they should get the sickle sharpened and purchase one more sickle. A-2 and A-3 went for that job and returned after sometime with the job accomplished. Weapons were shown to A-1 and they were kept in the flat. However, in his evidence, he has stated that after reaching the flat, A-2 told him that he would go to sharpen the sickle at the ironsmith's shop. He did not return for sometime. Hence, A-3 went in search of him. Thereafter, they returned. They had purchased one more sickle.

138. Undoubtedly, there is some inconsistency in these two versions. But that does not make dent in the core of PW-1's evidence. There is consistency to the extent that A-2 and A-3 brought one more sickle.

139. In the police statement, PW-1 has said that after sometime Kartikraj and Sanjeevkumar Roy (A-2) brought Pepsi from outside and thereafter agent Pramod Dodake had arrived at that place. However, in the court, he has said that after departure of Dodake from the flat, A-2 and Kartikraj had left the flat within 15 minutes. It is true that PW-1 has committed some error in narrating the sequence of events. But that is inconsequential,

because the fact remains that A-2 and Kartikraj were in the flat at least for sometime when Dodake arrived.

140. While in the court PW-1 has stated that A-1 had concealed string and sickle beneath his mattress and Santoshkumar Roy had concealed a revolver beneath his mattress after departure of Kartikraj and Sanjeevkumar Roy for bringing bottle and Pepsi and C.D.s, he has not stated so before the police. This omission also does not appear to us to be significant. It is just an omission to state some details. There does not appear to be any inconsistency about the use to which these articles were put.

141. In his police statement, PW-1 has not stated that he had placed the phone near the ear of Kartikraj and that Kartikraj was asked to talk in Hindi only; that in order to conceal their location, he had been to STD booth to make call to Kartikraj's father; though he has stated so in the court.

142. In his police statement, PW-1 has said that they were chatting till 4.00 p.m. and, thereafter, Kartikraj was assaulted and he was asked to keep quiet, sometime thereafter A-1 had untied his legs and asked him to go to bathroom. But, he has not stated before the police that hands, legs and mouth of Kartikraj were tied again after his return from bathroom and W.C.

143. In his police statement, he has stated that till 2.00 p.m., A-1 was enquiring with father of Kartikraj about money and he was asking Kartikraj as to how much money his father would be in a position to give them. In his police statement, he has stated that till 4.00 p.m., they were chatting with each other and at that time Kartikraj had said that why A-1 was behaving with him in this manner as there was no reason for enmity between them. In his evidence in court, there are no such exact assertions.

144. In the court he has stated that Kartikraj was freed for sometime for going to toilet, etc. The door of the toilet was kept open and A-2 was standing at the door with a revolver and others were standing outside the toilet. When Kartikraj returned from toilet, he was asked by A-1, how much money his father would be in a position to give them. Kartikraj told them that his father was seriously ill and it would be difficult for him to collect the amount. He told them that at the most, his father would be in a position to collect amount of Rs.4 to 5 lacs with difficulty. Kartikraj asked A-1 that they were friends, why A-1 was behaving with him in that manner and what was the reason for this enmity. Kartikraj told him that if he is released, he would pay any amount.

145. If these versions are compared, it is evident that though there is some variation, one cannot describe the version in the court as diametrically opposed to the one in police statement.

146. In PW-1's confessional statement, there is omission regarding Kale's visit to the flat.

147. In his police statement, he has not stated about his visit to tea stall with A-1 for having tea and his talk with A-1 on the way when they were returning to the flat.

148. In his police statement, he has mentioned that A-1 had left the flat for having a cup of tea. In his statement before the police, he has stated that a piece of right leg and one arm were kept in one blue coloured rexin bag whereas in his evidence, he has stated that in one blue colour rexin bag, one leg of Kartikraj was kept and in one red colour rexin bag, one hand and a piece of leg of Kartikraj were kept.

149. In his statement before the police, it is mentioned that A-1 took him to the flat of Dodake but he has not stated so in his evidence in the court. In his police statement, he has stated that after having meals at Udipi Hotel, they returned to the flat of Pramod Dodake at about 10.30 p.m. This is not stated by him in his evidence in the court.

150. We have already noted that there are not many omissions or inconsistencies in PW-1's evidence in the court and his confessional

statement. But the question is whether PW-1's evidence has to be discarded because of above omissions or inconsistencies between his evidence in the court and his police statement. In this connection, we have already referred to the observations of the Supreme Court in ***Madan Mohan Lal's case (supra)*** where the Supreme Court has observed that when the approver gives his police statement, he does not know that he would be granted pardon and possibly for that reason he may not come out with all the facts known to him. But, he does so before the Magistrate as he knows that if he makes a full disclosure he would be granted pardon. The Supreme Court made it clear that omission in the police statement therefore would not by itself render the approvers evidence unreliable. The court will have to consider whether taken as a whole and in the light of the facts and circumstances of the case, it was a credible version or not.

151. Omissions which we have noted above are not glaring omissions and by themselves do not render PW-1's evidence unreliable. They are either omissions of some trivial details or some additions which are not contradictions. The evidence of PW-1 will have to be read keeping in mind the fact that he is deposing about a chain of events which began from 25/7/2001 when A-3 visited his home in Patna. PW-1, A-2 and A-3 boarded train on 27/7/2001. They reached Pune on 1/8/2001 at 10.30 p.m. He has given details of each and every event which took place during the span of about 12 days. His evidence discloses that each day was packed

with numerous events. Along with the accused, PW-1 interacted with various persons. Conspiracy was hatched, various articles were purchased, sim cards were loaded in mobile phone, threatening calls were made, residence was shifted from one flat to another, Kartikraj was killed, his body was cut into pieces, packed in bags and bags were disposed of, weapons used by the accused and articles belonging to Kartikraj were disposed of and even thereafter all of them pursued their object of getting the ransom amount. When one has to give vivid details of numerous events, there are bound to be some discrepancies and some omissions. They are but natural. In fact, if they are not there, it would return an impression that the witness is tutored. In the facts of this case, taken as a whole, the evidence of PW-1 appears to us to be reliable despite some omissions and discrepancies. No doubt as stated by the Supreme Court in ***Dagdu's case (supra)***, though approver's statement cannot be discarded for the mere reason that he did not disclose the entire story in his police statement, if there are contradictions they may cast a veil of doubt over his involvement of others. We do not find that there are any such contradictions which would cast a veil of doubt over PW-1's involvement of others. But in ***Narayan Chaudhary's case (supra)***, the Supreme Court has said that even contradictions will not render the entire evidence of the approver unreliable. In that case, PW-2 had become approver. There were some omissions in his evidence. The Supreme Court found the omissions to be of trivial details and observed as under:

> *"Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person. The omissions in the earlier statement if found to be of trivial details, as in the present case, the same would not cause any dent in the testimony of PW-2. Even if there is contradiction of statement of a witness on any material point, that is no ground to reject the whole of the testimony of such witness."*

152. In our opinion, none of the omissions or discrepancies in the evidence of PW-1 are serious. Taken as a whole, PW-1's evidence inspires confidence. Though we have found the approver to be a reliable witness, in the light of the Supreme Court's judgments which we have quoted hereinabove, it is necessary to find out whether his evidence is corroborated

in material particulars qua each accused. But the independent corroboration need not be of every material circumstance. There must be additional evidence rendering it probable that the story of the approver is true and that it is reasonably safe to act upon it. We will therefore refer to the additional evidence and circumstances which provide corroboration in material particulars and render approver's story probable. We shall also at appropriate stage deal with the criticism levelled against that evidence by the learned counsel for the accused.

153. Before we go to the aspect of corroboration, we must deal with one important aspect. The trial court has disbelieved PW-10 Anjali Dhumal and PW-17 Ganpat Salunke holding that their evidence does not inspire confidence. The trial court has also not relied upon the chemical analyser's report on the ground that the prosecution has not adduced the evidence of the carrier to establish that the muddemal articles were in a sealed condition when they were sent to the chemical analyser's office.

154. The learned APP contended that the evidence of PW-10 and PW-17 has been wrongly rejected by the trial court. Relying on the judgment of this court in ***Smt. Meena Mudaliar v. State of Maharashtra, 1993 Cri. L.J. 3634*** the learned APP contended that the chemical analyser's report states that the packets sent to him were sealed. There is enough evidence on record to establish that the packets were sealed and, therefore,

merely because the carrier was not examined, the chemical analyser's report cannot be rejected.

155. Relying on the judgments of the Supreme Court in ***State of Tamil Nadu v. Rajendran 1999 Cr.L.J. 4552*** and ***Sham Sunder v. Puran & Another, AIR 1991 SC 8***, she submitted that since this court is dealing with confirmation case and also with an appeal for enhancement of the sentence this court can reassess the entire evidence and come to its independent conclusion. We find substance in this submission of the learned APP.

156. In ***Rajendran's case (supra)*** the Supreme Court discussed how the High Court should deal with a reference under Section 366 of the Code made by Sessions Judge on passing a sentence of death. The Supreme Court held that the High Court has to satisfy itself whether a case beyond reasonable doubt has been made out against the accused for infliction of the extreme penalty of death. The proceedings before the High Court in such a case, observed the Supreme Court, require a reappraisal and reassessment of the entire facts and law so as to come to its independent conclusion but while so doing the High Court cannot also totally overlook the conclusion arrived at by the Sessions Judge. The Supreme Court further added that in performing its duty, the High Court is of necessity bound to consider the merits of the case itself and has to

examine the entire evidence on record. The legislature having provided in the confirmation proceedings, a final safeguard of the life and liberty of the subject in cases of capital sentences, the duty of the High Court, added the Supreme Court, becomes more onerous to consider independently the matter carefully and examine all relevant material evidence and come to a conclusion one way or the other.

157. The State of Maharashtra has preferred an appeal for enhancement of the sentence awarded to A-2 and A-3. The learned APP contended that the powers of the High Court in dealing with the evidence while exercising its jurisdiction under Section 386 of the Code are very wide. It can reappreciate the entire evidence and form its own conclusions. It can accept the evidence which the trial court has refused to accept. In ***Sham Sunder's case (supra)***, the Supreme Court dealt with the scope of powers of the High Court under section 386 of the Code. The learned A.P.P. relied on the following paragraph of the said judgment.

> *"The powers of the High Court in dealing with the evidence are as wide as that of the trial court. As the final court of facts, the High Court has also duty to*

examine the evidence and arrive at its own conclusion on the entire material on record as to the guilt or otherwise of the appellants before it."

158. In view of the above judgments, we will consider whether PW-10 and PW-16's evidence needs to be kept out of consideration as has been done by the learned Sessions Judge. We will also consider whether the Chemical Analyser's report, which is rejected by learned Sessions Judge should be accepted.

159. The learned judge has disbelieved PW-10 Anjali Dhumal, a resident of Amarpali Society. According to this witness, on 5/8/2001 at about 9.30 in the morning, when she was hanging the clothes for drying in the gallery, she found the accused also drying their clothes in the gallery. She asked them where they come from. They told her that they come from Bihar and they wanted to take education in Pune. According to her, she had talked to them in Hindi. She asked their names and one of them told her their names. She identified the accused in the court. She has further stated that on 9/8/2001, there was no water in the common tank of the building. In order to verify whether the water tap was kept open by the accused, she went to the house of the accused but, she found it to be locked. The learned judge has disbelieved this witness on the ground that according to the approver,

the plan of conspiracy was disclosed by A-1 on 3/8/2001 and, therefore, no accused would have disclosed their names to this witness. But the learned judge has further gone on to say that "however it may be that on 9/8/2001 she could have found Flat No.5 locked when she went there to see whether the water tap was kept open". Though the learned judge has expressed that some portion of her evidence could be believed, he has ultimately held that it is unsafe to accept the evidence of this witness. In our opinion, the learned judge has erred in disbelieving this witness. It is true that she says that the accused disclosed their names to her but she has not stated what names were disclosed by the accused. It could be that the accused gave false names to her. Moreover, the accused did try to give false information to her. They told her that they had arrived at Pune to take education. Therefore, on the ground that they disclosed their names to her, this witness cannot be disbelieved. Being a neighbour, her presence in the balcony on 5/8/2001 at 9.30 in the morning is natural. It is true that she has identified only PW-1 and A-1 in the identification parade but, from this, it can be inferred that on 5/8/2001 in the morning, PW-1 and A-1 along with others were present in the Amarpali Society. Her evidence was sought to be attacked by the learned counsel for the accused by saying that she has stated that she saw the accused at 9.30 in the morning on 5/8/2001. However, PW-1 says that at 9.30 a.m., they left for Lonavala by train. Therefore, she could not have seen them at 9.30 a.m. We are not impressed by this submission. This witness could have made a minor error in giving the exact

time when she saw the accused. That is no reason why she should be disbelieved. In her cross-examination, the defence has not been able to elicit anything which would destroy her version in her examination-in-chief. We, therefore, believe this witness.

160. We are, however, of the opinion that the learned judge has rightly disbelieved PW-16 Ganpat Salunke, the ironsmith. His evidence is totally discrepant and cannot be relied upon.

161. In our opinion, Chemical Analyser's report also corroborates PW-1. The learned judge has wrongly rejected it on the ground that the carrier was not examined to state that when muddemal articles were sent to the Chemical Analyser they were in a sealed condition. In this case, the evidence of the pancha witnesses so also the Chemical Analyser's report clearly indicate that the articles were in a sealed condition. As stated by this court in ***Meena Mudiliyar's case (supra)***, when Chemical Analyser's report records that the seals were found intact, there is no question of examining the police constable who took the samples to the Chemical Analyser.

162. Chemical Analyser's report [Ex-255(1)] states that blood group of A-1 is AB. Chemical Analyser's report [Ex-255(2)] states that blood group of A-3 is `O'. Chemical Analyser's report [Ex-255(3)] states that blood group of PW-1 is `O'. Chemical Analyser's report [Ex-255(4)] states that

blood group of A-2 is `O' group. Bank card (Article 27) states that blood group of deceased Kartikraj was `A'. All Chemical Analyser's reports state that seals of the samples were intact.

163. PW-17 is Riyaz Shaikh, who has acted as a pancha to Memorandum (Ex-99) and panchnama (Ex-100). According to him, on 13/8/2001, A-1 made a statement that he would show the place of offence. A-1 led them to Flat No.5 at Amarpali Society. From the flat, the police seized several articles. They included, inter alia, a pillow cover, dust and whitish liquid from drainage. Blood was found on W.C. wall, bath room wall, etc. According to Riyaz Shaikh, all articles were seized and scaled and panchnama (Ex-100) was prepared. In the panchnama, it is stated that the sealed articles were kept in Khaki packets and were wrapped in Khaki papers. The description of the sealed articles was noted. The panchas signed on them and lac seal was put on them.

164. PW-30 is pancha Hrishikesh Deshpande. He is the pancha to memorandum (Ex-135) and panchnama (Ex-136). He has stated that on 21/8/2001 at the instance of A-2, a plastic bag was recovered from water under the Bundgarden bridge. It was found containing two koytas one with grip and the other without grip. There was one Hacksaw frame and six hacksaw blade broken pieces. The weapons were found stained with blood. All the articles were wrapped in a piece of paper. They were scaled and a

panchnama was drawn and his signature was taken thereon. He identified muddemal articles 11 to 14 in the court as being the same articles. Panchnama (Ex-136) states that a paper seal was put on the sealed articles. PW-53 P.I. Dilip Shinde has stated that on 7/9/2001, he sent all the seized articles to the Chemical Analyser, Pune, under yadi (Ex-269). It was sent through P.C. Jagtap. All the articles were in a sealed condition.

165. Ex-270 is the Chemical Analyser's report dated 28/3/2002. It states that there were "two sealed envelopes, one sealed bottle and eight sealed parcels – seals intact and as per copy sent". Therefore, samples were sent in a sealed condition and they were received in a sealed condition. As per this report, pillow cover, dust collected from the place of offence and whitish liquid collected from the drainage had blood of `A' group. Koyta (Ex-38) and hacksaw blade frame (Ex-40) which were recovered at the instance of A-2 had blood of `A' group on it. Human blood was found on hacksaw pieces. On several other articles, human blood was found but blood group could not be determined. We feel finding of blood of `A' group, which is Kartikraj's blood group, on the weapons and on the articles seized from the place of offence, is a clinching circumstance.

166. Mr. Gupte however contended that PW-47 Nitin Sontakke who conducted the identification parade of weapons has stated that on 30/8/2001, before the identification parade, he received all the weapons in a sealed

condition. He removed the seals for the parade. In the cross-examination, he has stated that after completion of the identification parade, he sealed the weapons and he destroyed the original wrappers of the muddemal property articles. It is contended that the original seals having been destroyed, the link to establish that the weapons which were sealed were the same weapons and that same weapons were sent to the Chemical Analyser, is snapped.

167. We are not impressed by this submission. There is no reason for us to disbelieve PW-47 Nitin Sontakke, who conducted the identification parade of weapons when he stated that the weapons were sealed when they were brought to him, he removed the seals, held the parade and again sealed the weapons. There is no need to presume that wrong weapons were sent to the Chemical Analyser without there being any basis for it. Nitin Sontakke had no enmity with the accused. The fact that he destroyed the original wrappers would not nullify the effect of Chemical Analyser's report in the facts and circumstances of this case.

168. Even if it is presumed for a while that the circumstance that blood of `A' group was found on koyta and hacksaw blade frame has to be kept out of consideration because of destruction of original wrapper, same thing cannot be said about pillow cover, dust and whitish liquid in which blood of `A' group was found. To that extent, Chemical Analyser's report gives a

blow to the defence version that Kartikraj was drunk, he had a fall and he died because of the fall. Finding of blood in this manner is inconsistent with the theory of death by a fall. There is no doubt that after Kartikraj was strangulated to death his body was cut into pieces in the Amarpali flat. The Chemical Analyser's report corroborates PW-1's evidence.

169. Presence of motive is one circumstance which provides corroboration to the approver's evidence. That the accused had a motive to commit murder of Kartikraj can hardly be disputed. PW-1 wanted to go to Bombay to hand over his Music Album to T-Series Music Company. A-2 wanted to join computer course and A-3 wanted a job. It is obvious, therefore, that they were going to Bombay to earn livelihood. In the night between 3/8/2001 and 4/8/2001, A-1 gave them outline of a plan to abduct Abhijeet Kothari or Kartikraj, whose parents were rich, for ransom. He said that by executing this plan they would earn Rs.10 to Rs.15 lacs. Abhijeet Kothari was not available hence, they abducted Kartikraj for ransom. They phoned PW-49 Subha Ramraj, father of Kartikraj and PW-50 Santosh Ramraj, brother of Kartikraj for ransom. Their evidence bears out this fact. Even after Kartikraj was killed they kept making threatening calls for money and even waited at Juhu Chaupati to get money. This is established from the evidence of PW-1 and from the evidence of PW-51 API Lotlikar who also received the calls. PW-52 API Jadhav corroborates PW-51, API Lotlikar. Besides PW-3 PSI Jagannath Jagtap who received complaint of

PW-2 Bhadange and PW-4 PSO Savant who made station diary entry at Deccan Gymkhana Police Station also lend support to the prosecution case of strong motive. The printout of the phone calls also support this. Therefore, motive is clearly established. As held by the Supreme Court in ***Suresh Chandran Bihari v. State of Bihar, AIR 1994 SC 242***, in a case where there is clear proof of motive for the commission of the crime it affords added support to the finding of the court that the accused was guilty of the offence with which he is charged. A clear proof of motive has indeed strengthened the approver's evidence.

170. At this stage, we may deal with the argument advanced by the learned counsel for the accused that evidence of PW-1 is artificial and inherently improbable because he hardly knew A-1 and, therefore, he could not have agreed to be a party to such a ghastly conspiracy. We find nothing unnatural about PW-1's conduct. PW-1 knows A-2 and A-3. A-1 knows A-2. They hail from Bihar. They were in need of money and, hence, PW-1 agreed to be a part of the conspiracy. Once strong motive is established, PW-1's conduct cannot be described as unnatural.

171. Another circumstance which is well established from the evidence on record is that PW-1 and the accused were seen together between 1/8/2001 to 12/8/2001. We have already referred to the evidence of PW-6 Shravan Gupta and PW-9 Kamal Prashun. Their evidence establishes that PW-1

and the accused reached Popular Heights Society at Pune on 1/8/2001 at about 10.50 p.m. and stayed there till the morning of 3/8/2001.

172. PW-7 Pramod Dodake the estate agent has stated that on 3/8/2001 at about 10.00 a.m., A-1 had arrived in his office with his three friends. The names of his friends were Sanjeevkumar Roy (A-2), Santoshkumar Roy (A-3) and Kumar Gaurav (PW-1). He had not been able to make arrangement for a flat for A-1. He asked them to stay at his flat at Kudale Patil Angan Apartment. He took them to that flat. All of them stayed in that flat till 4 O'clock of 4/8/2001. Thereafter, he made arrangement for their stay at flat No.5 in Amrapali Society. They shifted to that flat after 4.00 p.m. on 4/8/2001. On 7/8/2001 at about 9.30 p.m. he visited that flat. He found PW-1, A-1 to A-3 and one unknown person. A-1 introduced him to that person and told him that he was his friend Kartikraj, a Tennis player of National level. They were watching T.V. He was there for 20 minutes. This witness had ample opportunity to see them all. He identified them in the court.

173. PW-13 Umakant Kale is the owner of the Amarpali flat. According to him, on 8/8/2001, he had visited his flat. One boy opened the flat. One other boy was also there. In the court, he has stated that PW-1 and A-2 were present in the flat when he visited it. In the identification parade, he could identify only PW-1.

174. PW-10 is Anjali Dhumal. We have already expressed that the learned trial judge has wrongly disbelieved her. Being a neighbour, we find her presence to be most natural. She has stated that on 5/8/2001 at about 9.30 a.m., she found the accused drying their clothes in the balcony. When she enquired with them they told her their names and told her that they had arrived for taking education in Pune. In the identification parade, she identified PW-1 and A-1. She has stated in the evidence that she could not identify others. Memorandum (Ex-207) and evidence of PW-45 Adsul who conducted the identification parade support this.

175. PW-38 Rajesh Kumar, the occupant of the flat in Pereira Housing Society, Naigaon, has stated that A-2 visited his flat along with three more persons on 9/8/2001 at about 6.00 p.m. All of them stayed there and left his place on 12/8/2001. On 15/8/2001, PW-1 visited his flat along with the police. At his instance, some clothes were seized by the police. He identified all the accused in the court. The evidence of all these witnesses proves that PW-1 and the accused were seen together from 1/8/2001 to 12/8/2001.

176. PW-5 is Rajendra Kendale. His brother owns Sunny Video & Audio Shop situate at Vadgaon. He also works in the shop. He has stated that on 7/8/2001, four persons had arrived in his shop at about 10.00 a.m. They

wanted T.V. & VCD player on hire basis. He asked their names. One of them told his name as Santosh Bariyar. He told him that he was residing in Amarpali Society. He gave the names of other persons as Santosh Roy, Sanjeev Roy and Kumar Gaurav. Kendale told them that they must bring some person who should be known to him as well as known to them if they wanted VCD player on hire. They told the names of Milind Sant and Pramod Dodake of Shubham Estate Consultants. He told them to bring either. After some time, they brought a visiting card of Shubham Estate Consultant (Ex-54). It was bearing endorsement in the handwriting of Mr. Sant. He then gave them T.V. and VCD player. They paid Rs.240/-. He produced office copy of receipt No.1508 (Ex-65) in support of his evidence. They were told to return the articles at 9.00 p.m. Thereafter, they went with cassettes, VCD player and T.V. At about 9.00 p.m., A-1 and one fat person came to the shop. They told him that they wanted to use T.V. and VCD player till next day. He told them that they will have to pay additional amount of Rs.240/- for using the articles till morning. They paid Rs.50/- deposit. The acknowledgement was taken at the back of the receipt bearing No.1508. When Ex-58 bearing photograph of Kartikraj was shown to him, he stated that he is the same person who had come with A-1 at about 9.00 p.m. on 7/8/2001. On 8/8/2001, at about 10.00 a.m., all articles were returned by PW-1 and A-3. He has produced receipt (Ex-65) in support of this statement. He identified all the accused and PW-1 in the court.

177. From 9/8/2001 to 12/8/2001, PW-1 and the accused were at Pereira Housing Society at Naigaon. In this connection, evidence of PW-38 Rajesh Kumar Arun Kumar will have to be read. He was residing in the flat at Pereira Housing Society. He knows A-3 as they hail from the same village in Bihar. According to him, A-3 had come to his place at Naigaon on 9/8/2001 at 6.00 p.m. Three persons were with him. They stayed at his place for three days and left the place on 12/8/2001.

178. He has stated that he was in his flat till 3.00 p.m. on 12/8/2001. Then he went out and returned at 5.30 p.m. At that time, A-3 and others were not present in the flat. On 15/8/2001 at about 12.30 p.m., PW-1 arrived at his place with police officers from Pune. This witness obviously had ample opportunity to see the accused. He identified all of them in the court.

179. In this connection, it would be appropriate to refer to the evidence of PW-51 Shri R.R. Lotlikar API and PW-52 Shri Raghunath Jadhav API. According to PW-51, API Lotlikar who had laid the trap, all the accused and PW-1 were caught on 12/8/2001 in the evening at Juhu and Andheri when they went to collect ransom. PW-52 API Jadhav has corroborated API Lotlikar. All these witnesses clearly establish that PW-1 and the three accused were together from 1/8/2001 to 12/8/2001. We find no reason to disbelieve these witnesses.

180. The conspiracy was hatched in Kudale-Patil Angan Apartment on 3/8/2001. A-1 disclosed the plan of abducting Abhijeet Kothari or Kartikraj for ransom and of killing them, if any difficulty arises. In his evidence PW-1 has given details about the said plan. In the nature of things for the hatching of criminal conspiracy there will be no other direct evidence apart from the evidence of PW-1 but the other evidence on record provides the necessary corroboration for this evidence of PW-1.

181. Since it was decided that, if any difficulty arises the hostages will have to be killed and the pieces of dead bodies will have to be put in polythene bags and then kept in rexin bags and disposed off, on 4/8/2001 at about 8-30 p.m. the accused and PW-1 went to Swargate to purchase bags. They went to the shop of PW-28 Usman Mohammad Chand Chudi Firoz. According to this witness on 4/8/2001 at 9 p.m. four boys arrived at his shop. Two of them entered the shop and two were standing outside the shop. They asked for travelling bags. He showed bags of FILA company. They asked for biggest bag from him. Accordingly he showed them the biggest bag from his shop. He told them the price. They started bargaining. Then they purchased three bags from his shop of red, yellow and blue colour. They also purchased seven polythene bags. When bag muddemal article No. 10 was shown to him in the court he identified it as the same bag sold by him. In the

identification parade he identified PW-1 and A-1 as the persons who had purchased bags from his shop.

182. In this connection it is also necessary to read the evidence of PW-25 Mohammad Mumtaz. He is the manufacturer of rexin bags. He has stated that he sells FILA bags to Usman Seth who owns "Classic bags' shop. When M.A. No.10 was shown to him, he stated that he had sold it to Usman Seth. He stated that M.A. No.2 was produced by him as a sample piece before PW-53 P.I. Shinde.

183. PW-11 Yusuf Poonawala is the pancha. He has stated that on 13/8/2001 he was asked by the police to act as pancha. He agreed. A-1 expressed desire to produce the two bags concealed near Mula River. One bag was concealed beneath arch of Sambhaji Bridge near the temple, in the river bed and second bag was concealed on the bank of river in the grass. He told them that he will show them those places and those bags. Accordingly memorandum (Ex- 83) was prepared. A-1 led them to Deccan Gymkhana area. The jeep was stopped there. A-1 took them under the bridge by steps. He removed one bag concealed in grass and water and produced it before them. It was a blue colour rexin bag bearing mark of FILA company. When the bag was opened it was found containing a plastic carry bag. In that plastic carry bag there was a human leg below thigh Panchnama (Ex-84) was accordingly drawn.

There is some confusion about the article number of the bag. He has referred to it as Muddemal Article 2. This is a mistake because Muddemal Article 2 is a sample bag and P.I. Shinde has stated that he had sent it along with Muddemal Article 10 to the handwriting expert to find out whether screen printing on the said bag was identical with printing on the sample bag. P.I. Shinde has confirmed that leg was found in Muddemal Article 10.

184. PW-39 is PC Deepak Desai. On 13/8/2001 he carried the bag Muddemal Article No. 10 containing human leg to Sassoon hospital. When bag Muddemal Article No. 10 was shown to him in the court he identified it as being the same bag in which human leg was found and which he had carried to Sassoon hospital. The evidence of all these witnesses confirm that on 4/8/2001 at 8-30 p.m. at Swargate the accused purchased seven polythene bags and three rexin bags. Certain discrepancies in the evidences of these witnesses are pointed out to us. This particular evidence has come under heavy attack. We shall deal with it a little later.

185. PW-29 is Sanjay Mantri. He is the owner of Prasad Medical shop. His shop is in Deccan Gymkhana area. According to him on 4/8/2001 at 9-30 p.m. two customers had arrived in his shop. A.T. & T prepaid card was sought by them. Prepaid card bearing No. 9822148663 was sold by him to them. He has produced the receipt Exh.-

132 in connection with the said purchase. He sold a Sim card and charged the mobile phone and took Rs.50/- for the same. He obtained a duly filled in application form from the customer. The said application form is at Ex-48. He issued a receipt for Rs.699/-. He produced Ex-133 which is the receipt of Srikrishna Sales. This receipt shows that on 4/8/2001 he had purchased three prepaid cards, one of them was prepaid card No. 9822148663. In the identification parade he identified A-1 and PW-1.

186. PW-34 is one Mr. Prakash who was working as Manager in A T & T Company at the relevant time. He produced copies of letters received by him from the Additional Commissioner of police seeking information in respect of incoming and outgoing calls. As per the letters (Ex-147) and (Ex-148), print outs in respect of incoming and outgoing calls of mobile telephone No. 98022056021 (Sim Card of API Lotlikar and Sim Card No. 9822148663 of PW-1) were supplied by him along with his letter dated 20/8/2001. The print outs, when shown to him were identified by him and they were collectively marked as Ex-150. He also produced print out dated 29/8/2001 issued to API Lotlikar on 29/8/2001 which is at Ex-151. These print outs support PW-1's case that on his mobile phone threatening calls were made to Kartikraj, his brother and father at Hyderabad and thereafter to API Lotlikar who posed as Sham Naidu.

187. The next circumstances is of purchase of hacksaw blades and hacksaw frame. PW-32 is Ajay Chawla is the owner of Minu General Stores situated at Pimpri. According to him on 5/8/2001 at 1-30 p.m. four boys entered his shop and asked for hacksaw blade. He asked them for what purpose it was required. They told him that it was required for cutting a tree. He told them that in that case they should buy a Saw. They told him that they wanted hacksaw blade with its frame. After trying several blades on the frame ultimately they selected three hacksaw blades and hacksaw frame totally worth Rs.55/-. They did not seek any bill. He has stated that the hacksaw blades purchased by the customers was bearing C-mark. When hacksaw blade muddemal article 13 was shown in the court he identified it as being the same hacksaw blade bearing `C' mark sold by him. In the identification parade, he identified PW-1, A-1 and A-2. In the identification parade of weapons held on 30/8/2001 he identified muddemal article 13 as being the same hacksaw blade.

188. PW-47 is Nitin Sontake who conducted identification parade of weapons on 30/8/2001. Memorandum of the identification parade is at Ex-222. Muddemal Article 13 the hacksaw frame was identified by PW-32 Ajay Chawla.

189. PW-30 is Rushikesh Deshpande. He is a panch to the memorandum and panchnama (Ex-135) and (Ex-136) respectively. He has stated that

on 21/8/2001 A-2 expressed his desire to produce koyta, frame of hacksaw blade and pieces of hacksaw blades before the police from the place where they were concealed. Accordingly Memorandum (Ex-135) was prepared. A-2 led the police in a jeep to Alankar Talkies. The jeep was halted on the bridge. A-2 pointed out the place where the articles were concealed. He took them to the river bed. He told them that articles were thrown near Mori No. 5 of the bridge. Constable could not trace articles. Assistance of two fishermen was taken. One of them found the bag near Mori No. 5. It was a plastic bag. The bag was opened. It was found containing two koytas (M.A.11 and M.A.12). One with grip and one without grip. One koyta which did not have any point, frame of hacksaw blade and six pieces of hacksaw blades were also found in the bag. All the articles were seized and sealed under panchnama (Ex-136).

190. Chemical Analyser's report (Ex-270) states that blood of "A" group was found on hacksaw frame and a pieces of hacksaw blade and human blood was found on other hacksaw blades. PW-1 has stated that the head was separated with the help of the hacksaw blade. This evidence supports PW-1's case that hacksaw blades and hacksaw frame were purchased for execution of the conspiracy and were used in separating the head of Kartikraj.

191. The prosecution has then led the evidence of PW-31 Motilal Sukhija to prove purchase of a koyta by the accused on 5/8/2001 at 2-30 p.m. Motilal Sukhija is the owner of "Asha Hardwares" a hardware shop situate at Pimpri. He has stated that on 5/8/2001 at about 2-30 p.m. four customers had arrived in his shop. Two came inside the shop and two stood in front of his shop. Those who had come in, asked for a koyta. He asked them for what purpose it was needed. He was told that it was needed for peeling of coconuts. There was bargaining on the price. He refused to reduce the price. Thereafter the customer called one of his companions who was standing in front of his shop and took money from him and gave him. He issued a receipt. The customer asked him whether a goat can be cut with it. Sukhija told him that it will not be useful for killing goats. He produced duplicate receipt (Ex-138) bearing No. 8630. In the identification parade he identified A-3. In the identification parade of weapons he identified the koyta MA 11. When MA 11 was shown to him in the court he identified it to be the same koyta.

192. PW-47 Nitin Sontake who conducted the identification parade of weapons on 30/8/2001 has stated that PW-31 Sukhija identified koyta MA 11 in the parade.

193. PW-30 Rushikesh Deshpande has deposed about the recovery of the bag containing weapons at the instance of A-2 on 21/8/2001 from under a bridge situate near Bundgarden. According to him the bag was found containing koytas MA 11 and MA 12. The memorandum and panchnama are Ex-135 and Ex-136 respectively. The Chemical Analyser's report (Ex- 270) states that MA 11 had blood of "A" group on it. In his evidence PW-1 has deposed about its use. PW-1 has identified MA 11 in the court when it was shown to him. Two koytas were received at A-2's instance and one of them was found having blood of `A' group. The above evidence, therefore, corroborates PW-1's evidence qua A-2.

194. The prosecution has sought to rely on one more circumstance. According to the prosecution on 5/8/2001 at about 5-30 p.m. A-2 and A-3 purchased from PW-16 Ganpat Salunke, the ironsmith, koyta (article 12) and got sharpened from him koyta (article 11). However, the trial court has rejected the evidence of PW-16 Ganpat Salunke as being discrepant. We have already stated that we concur with this view of the learned Judge. But the fact remains that pancha PW-30 Rushikesh Deshpande has stated that at the instance of A-2 a bag containing koytas MA 11 & MA 12 was recovered. The chemical analyser's report (Ex-270) states that on koyta (article 12) human blood was found. PW-1 has deposed about its use. He has identified MA 12 when it was shown to

him in the court. The above evidence, therefore, corroborates. PW-1's evidence qua A-2.

195. PW-1 has stated that after the body was cut into pieces it was realised that middle portion of the body of deceased Kartikraj was heavy and a big bag was needed for keeping it. A-1 told them to purchase one more Rexin bag. They went to Pune Railway Station for that purpose. PW-15 is Ramesh Khandelwal, the owner of Khandelwal General Stores situated at Kasba Peth, Pune. He has stated that on 8/8/2001 at 10-15 p.m. four boys came to his shop. Two boys were waiting outside and two of them came inside. They asked for the biggest bag. They selected the biggest bag and paid Rs.450/- for it. In the identification parade he identified A-1 and PW-1. In the court he identified A-1 as the person who had paid the money and PW-1 as the other person who had entered his shop. This evidence corroborates PW-1 as regards the cutting of dead body and buying a big bag for putting the middle portion of the body in it as it was heavy, as per the direction of A-1.

196. According to PW-1 even after Kartikraj's murder calls were made on his mobile to demand ransom amount. There is corroboration to this version. PW-24 is Ramakant Karlekar who runs a shop in the name and style of Shrinathji Electronics at Thane. This witness has produced Ex-93

which is the invoice showing that he had purchased 10 Sim cards on 27/7/2001 out of which one Sim card bearing No. 9821260381 was sold to PW-1. According to him on 11/8/2001 one customer by name Kumar Gaurav had arrived in his shop for purchasing Sim card at about 11 a.m. along with his three friends. His friends were standing in front of the shop. He obtained Rs.750/- from Kumar Gaurav. He got one application form duly filled in from Kumar Gaurav. He produced copy of the said application (Ex-120) in the court. He identified PW-1 and A1 to A3 as persons who came along with PW-1 to his shop in the court.

197. PW-41 is Hemant Raut who was working as Administrative Executive in B.P.L. Mobile company at the relevant time. He has produced in the court print out (Ex-186) of Sim Card No. 9821260381 which was purchased by PW-1 from Thane showing calls made to Hyderabad as well as to mobile number of API Lotalikar. With the assistance of the learned counsel, we have carefully perused this print out. We are more than certain that it completely bears out PW-1's case of calls made to Hyderabad as well as to API Lotlikar which are of vital importance to this case. PW-24 Ramakant Karlekar has established that Sim card No. 9821260381 was purchased by PW-1 Ex. 120 is the application filled by PW-1 - Ex-186 establishes that all the calls were outgoing calls. They tally with Ex-150 and Ex-234. Ex-186 shows only one incoming call from API Lotlikar's Cell number but it is of zero

duration. In our opinion, this evidence provides required corroboration to PW-1's evidence as regards various threatening calls made at the instance of A-1.

198. The prosecution has also examined STD booth owners from whose booth calls were made to Hyderabad by the accused. PW-22 is Laxmikant Mundada. He is running STD booth near Parvati at Pune in the name and style of "Surabhi Communication". He produced xerox copy of entries made in the register dated 8/8/2001 marked Ex-114, which establishes that on 8/8/2001 two telephone calls were made to Hyderabad from his STD booth. He identified PW-1 as the person who had made the said calls.

199. PW-46 is Hirachand Ramchandani, who runs a STD booth and cosmetic store under the name and style of "Dinesh Stores" at Lonavala. The telephone number of his STD booth is 70013. He produced in the court copy of the bill (Ex-219) which establishes that on 9/8/2001 at about 11-22 a.m. a call was made from his booth to Hyderabad. It is true that this witness has not been able to identify the accused but from Ex-234 which are the details pertaining to telephone number 6582215 belonging to Kartikraj's father Ramraj furnished by Tata Tele Services Ltd., it is amply clear that this call was made to S. Ramaraj from PW-46

Ramchandani's telephone booth. Ex-234 has been admitted in evidence under Section 294 of the Code.

200. Ex-94 is a panchnama dated 15/8/2001. PW-14 Amjad Siraj Khan is a pancha to the said panchnama. Amjad Khan has said that at the instance of PW-1 from a telephone booth situated in front of Virar Railway Station, a print out of telephone call made by him on 10/8/2001 was obtained by API Lotlikar. The said print out was seized under the panchnama (Ex-95). The said print out / print slip (Ex-94) establishes that from the said STD booth situated opposite Virar Railway Station bearing the name "A-1 STD Booth" a call was made to Hyderabad on 10/8/2001 at 19-26 hrs.

201. PW-20 is Vinod Patel. He runs a STD booth and grocery shop at Kalyan. Print out (Ex-52) identified by him as being the one given by him to API Lotlikar establishes that from his telephone bearing No. 304883 on 11/8/2001 at 2-59 p.m. a call was made to Hyderabad on 040 6582215.

202. PW-19 is Vishal Teli, who runs transport business and STD booth in the name and style of Man Mandir Tours and Travels at Kalyan. Telephone number of his STD booth is 315884. He identified print out which establishes that a call was made to Hyderabad at 16-22

hrs. on 11/8/2001 from his STD booth. Shops of PW-20 Vinod Patel and PW-19 Vishal Teli were discovered at the instance of PW-1 on 15/8/2001 as per panchnama (Ex-95). Even if it is held that whatever identification of the accused made by these witnesses is not acceptable, the print outs / print slips and registers produced by these witnesses clearly establish that calls were made to Hyderabad at Kartikraj's residence.

203. We have personally checked the print outs and compared them with Ex-234 which contain the details of the telephone pertaining to S. Ramaraj supplied by Tata Tele Services and, we find that this evidence is unimpeachable. In fact there is no challenge to it at all. In our opinion, this evidence provides strong corroboration to the evidence of PW-1 that Kartikraj was abducted for ransom and that threatening calls were made to his father S. Ramaraj at Hyderabad.

204. PW-8 is Sachin Satav. He is the owner of Savitri Nivas Lodge. According to him, the telephone number of the telephone owned by him is 5530806. He used to know Kartikraj. He has stated that Kartikraj was residing in Savitri Nivas between 1/7/2001 and 7/8/2001. On 7/8/2001, he received a telephone call at about 8.40 a.m. He asked for the name of the caller. The caller told him that he was Santoshkumar Bariyar (A-1), a friend of Kartikraj. He told him to call Kartikraj and said that he would call after five minutes. He stated that he was calling from his mobile phone. PW-8

Sachin Satav called Kartikraj. Kartikraj came there. After 2-3 minutes, again a call was received. Kartikraj talked to him on the phone. Kartikraj told PW-8 Sachin Satav that he had a talk with Santoshkumar Bariyar, who was his friend. Kartikraj further told him that A-1 had invited him for dinner at night. Ex-151 is the print out of mobile phone no.98221 48663 belonging to PW-1. It shows that two outgoing calls were made on 7/8/2001 at entry nos.11 and 12. The calls were made to Sachin Satav's phone bearing no.5530806. PW-8 Sachin Satav, therefore, establishes that it is A-1 who made efforts to contact Kartikraj on the mobile phone of PW-1 to invite him to his flat. Sachin Satav, thus, corroborates PW-1 as regards the efforts made by A-1 to contact Kartikraj.

205. PW-8 Sachin Satav has further said that on 7/8/2001, Kartikraj left Savitri Nivas at about 1.00 p.m. on his motorcycle with a green colour bag on his shoulder bearing NIKE mark on it and, thereafter, he had not seen him. PW-36 is Mahindra Kamble. At the relevant time, he was working as a clerk along with Kartikraj in Railway Department. He was a friend of Kartikraj. According to him, Kartikraj had left the office at 5.00 p.m. on 7/8/2001 on his motorcycle. He was carrying a green colour bag bearing NIKE mark. PW-36 Mahindra Kamble has stated that thereafter he did not see Kartikraj.

206. PW-6 Shrawankumar Gupta, the watchman of Popular Height Society, has stated that on 7/8/2001, Kartikraj arrived at the Popular Height Society on his Splendor Hero Honda motorcycle. He was carrying a green colour bag bearing mark "NIKE". He asked him whether A-1 was present in Flat No.E-19. PW-6 Shrawankumar Gupta answered in the affirmative. As requested by him, the visitor wrote his name, registration number of his vehicle, timing of visit and the name of the person to whom he wanted to meet, in the Register. The relevant entries were identified by him and are marked as Ex-69. He has stated that the portion encircled in red ink was in his handwriting and the remaining was in the handwriting of the visitor. When photograph (Ex-58) was shown to him, he confirmed that he was the same visitor, who had visited the Society on 7/8/2001. He has further stated that subsequently A-1 and the visitor left the flat and entry to that effect was also taken by him in the Register. PW-48 is Ankur Kasawakar, who has acted as a pancha to panchnama (Ex-224) under which article 1, the register of Popular Height Society, was seized.

207. PW-7 Pramod Dodake has stated that he went to the Amarpali flat on 7/8/2001 at 9.30 p.m. He found the accused as well as the approver and one unknown person present in the flat. A-1 introduced the said person to him as Kartikraj, a tennis player of national level. PW-5 is Rajendra Kendale. When photograph of Kartikraj (Ex-58) was shown to him, he stated that he is the same person who had accompanied A-1 on the night of 7/8/2001 to

his shop requesting him that they wanted to keep the T.V. and V.C.D. player till the next day morning. He told him that they will have to pay additional amount of Rs.240/-. A deposit of Rs.50/- was paid by them and they took two more cassettes and left the shop. From the evidence of these witnesses, it is absolutely clear that Kartikraj was alive on 7/8/2001 and was in the company of the accused.

208. From the evidence of PW-6 Shrawankumar Gupta, it can be said that on 7/8/2001 at 18 hours, Kartikraj left the Popular Height Society along with A-1. This is supported by the entry in the register of Popular Height Society (article 6). The relevant entry is Ex-69. From the evidence of PW-7 Dodake, it is evident that on 7/8/2001 at 9.30 p.m., the accused and PW-1 were in the company of an unknown person, who was later on introduced to him as Kartikraj. From the evidence of PW-5 Rajendra Kendale, it is clear that at 9.00 p.m. on 7/8/2001, Kartikraj was in the company of A-1. They had visited his shop and requested that they may be allowed to keep the T.V. and V.C.D. player for the night. He has identified the photograph of Kartikraj as Ex-58. Therefore, Kartikraj was last seen in the company of the accused and PW-1. Evidence of PW-1 has been corroborated by the above evidence to a great measure. In ***Sahadevan alias Sagadevan v. State (2003) 1 SCC 534***, the Supreme Court has held that if the prosecution on the basis of reliable evidence establishes that the missing person was last seen in the company of the accused and never seen thereafter, it is obligatory on

the accused to explain the circumstances in which the missing person and the accused parted company. The accused have failed to do so.

209. There is also ample corroboration to PW-1's case of demand for ransom and telephone calls made for that. PW-49 S. Ramraj, who is the father of Kartikraj had sent fax messages (Ex-57 and Ex-58) to PW-2 Dattatray Bhadange. Pursuant to which, Dattatray Bhadange lodged complaint (Ex-56). PW-50 Santosh Ramraj has also spoken about the threatening calls made by the accused demanding ransom. PW-51 API Lotlikar, who posed as Shyam Naidu, a friend of S. Ramraj has also spoken about number of threatening calls received by him from 1/8/2001 to 12/8/2001. He is corroborated by PW-52 API Raghunath Jadhav. PW-51 API Lotlikar and PW-52 Raghunath Jadhav also establish how the accused were persistently making demand for ransom and how even after murdering Kartikraj they went to Juhu Choupati to collect the ransom. PW-42 Satish Nair, who is pancha to personal search panchnama (Ex-189) has deposed about the fact that three of the accused were nabbed at Juhu Choupati and one of the accused was nabbed at Andheri Railway Station on 12/8/2001 when they had come to collect the ransom.

210. Recovery of ring having the letter "K" from A-1 is an important circumstance deposed by PW-1. PW-1 has stated that the gold ring having letter "K" was recovered from A-1, when they were caught by the police on

12/8/2001, under personal search panchnama (Ex-189). When he was shown muddemal article No.46 (the gold ring having letter "K"), he identified it as being the same ring. He stated that that ring was removed by him when Kartikraj was killed. He further stated that the gold ring which was seized from A-1 was returned to A-1 by the police and while they were going to Pune, it was handed over to A-3 by A-1. In the panchnama (Ex-189), it is stated that this gold ring was recovered from A-1. Certain discrepancies in the evidence have however been pointed out to us by the learned counsel for the accused. PW-42 pancha Satish Nair has stated that the said gold ring was found in possession of A-3. In the second panchnama (Ex-197) dated 13/8/2001 also it is stated that the said ring was recovered from A-3 but, pancha PW-44 Sudhakar Deshmukh has stated that it was recovered from A-1. This confusion may be the result of the similarity of the first names of A-1 and A-3 or may be just the result of lapse of memory of the witnesses. But, in our opinion, this will not have any adverse impact on the prosecution story. That this ring belongs to Kartikraj is an established fact. When it was shown to PW-50 Santoshraj, the brother of Kartikraj, he identified it as being the ring of Kartikraj. He has stated that it was given to Kartikraj by his maternal aunt at the time of his thread ceremony. The prosecution has also examined PW-35 Sureshkumar Jain who was working as salesman in Shermal Jain & Co. which deals in jewellary. He produced in the court a copy of the receipt dated 19/4/2001 which is at Ex-154, which indicates that two gold rings

were sold to one Saroja Vishwanath from his shop on 19/4/2001 for Rs.3,000/-. He has stated that the ornaments manufactured in his shop bear “ISV” mark. When the ring was shown to him, he stated that it is the same ring which was manufactured by his company. We have seen this ring. The ring does bear the mark “ISV”. In our opinion, it is established that the gold ring is that of Kartikraj. The fact that it is recovered from the accused is very vital and it lends corroboration to PW-1’s evidence. The discrepancy as regards exactly from whose custody it was recovered, cannot be given much importance. This clinching circumstance goes a long way to prove the prosecution case.

211. PW-17 Riyaz Shaikh is the pancha to Memorandum Ex-99 and panchnama Ex-100. As per his evidence at the instance of A-1 on 13/8/2001 the police visited the place of offence which is flat No. 5, Amrapali Society. Several articles indicating commission of offence at that flat, were recovered. The police seized dust, drainage water and pillow cover which were found having blood of "A" group. Glasses and bottles of liquor were seized. Finger prints of the accused were found on them. Blood was found at various places. Helmet and identification card of Kartikraj were also seized.

212. PW-11 Yusuf Poonawala is the pancha to Memorandum Ex-83 and panchnama Ex-84 dated 13/8/2001. As per his evidence on 13/8/2001 at the instance of A-1 a bag containing human leg was recovered.

213. PW-18 Deepak Kule is the pancha to Memorandum Ex-103 and panchnama Ex-104 dated 13/8/2001. As per his evidence on 13/8/2001 at the instance of A-1 a motor cycle bearing registration NO. MH-12/A-5992 was recovered from the parking lot of Preetam Society. This motor cycle admittedly belongs to Kartikraj.

214. PW-33 Anandraj Tupe is the pancha to Memorandum Ex-142 and panchnama Ex-143 dated 24/8/2001. According to him on 24/8/2001 at the instance of A-1 a revolver and 4 cartridges were recovered from a plastic bag concealed under stones and bushes and earth from somewhere near Sinhgadh Road.

215. We have already referred to the recovery of two koytas, six pieces of hacksaw blades and one hacksaw frame at the instance of A-2. PW-30 Rushikesh Deshpande has deposed about it. The relevant panchnama is panchnama Ex-136.

216. PW-12 Abhijit Sawant is the pancha to Memorandum Ex-87 and panchnama Ex-88 dated 19/8/2001. According to him on 19/8/2001 at the

instance of A-3 a green NIKE bag was recovered from a canal of waste water at Wadgaon Budruk. In the said bag several articles of Kartikraj were found. The bag inter alia contained driving licence of Kartikraj, pay-in-slip of Kartikraj, one pocket telephone diary in which personal data of Kartikraj was written. One letter issued by railway department dated 7/7/2001 in the name of Kartikraj, one blood bank card of Kartikraj, railway pass of Kartikraj and keys of Hero Honda motor cycle were also found in that bag.

217. At the instance of PW-1 his bloodstained clothes as well as bloodstained clothes ofA-1 to A-3 were recovered. Pay-in-slip Ex-91-92, a bill of call made to Hyderabad on 10/8/2001 Ex-94 were also seized. The relevant panchnama is Ex-95 dated 15/8/2001. PW-14 Amjad Khan has deposed about it. These discoveries at the instance of A-1, A-2 and A-3 lend vital corroboration to PW-1's evidence qua each accused.

218. We must now turn to the medical evidence which also corroborates PW-1. From the evidence of PW-1 and the other evidence on record it can be said that Kartikraj was murdered on 8/8/2001 between 5.00 p.m. and 9.00 p.m. The body of Kartikraj could not be traced. Upon considering the evidence on record the trial court held that Kartikraj met with homicidal death.

219. According to the prosecution at the instance of A-1 on 13/8/2002 between 8.00 p.m. and 9.00 p.m. a blue rexin bag which was concealed in grass beneath the arch of the bridge near Deccan Gymkhana was recovered. When the bag was opened it was found containing a plastic bag. When the plastic bag was opened it was found containing a human leg with nylon rope after folding it near the knee. It was seized under panchnama Ex-84. PW-11 pancha Yusuf Poonawala has stated that beneath the arch there was grass and water. In the panchnama (Ex-84), it is stated that because the leg was completely wet, it was decomposed and the skin had peeled of and it was looking whitish. The case of the prosecution is that this leg was that of Kartikraj. We must record our finding that the prosecution has proved the discovery of leg at the instance of A-1. It is a circumstance which corroborates the evidence of PW-1 qua A-1 to a great extent. It strengthens the prosecution case.

220. On 13/8/2002 at 0.5 a.m., PW-40 Dr. Wable who was attached to Sassoon Hospital did post-mortem on the leg. Post-mortem report is at Ex-81. On examination Dr. Wable gave the following report :

1. It is human lower limb of right side.
2. Length of the lower limb-41".
3. Midthigh circumference-27"
4. Length of foot from greater toe to heel-9 ¾"

5. It is fiexed at knee.

6. Skin and other soft tissues show changes of decomposition with early adipocere and greenish discoloration of leg and foot.

7. Upper end is amputated at the level of head of femur. Margins cleancut but lacerated at places.

8. There is cleancut circumferential injury at the level of knee joint, bone deep. Margins lacerated at places.

- Abovementioned injuries are post-mortem.

Exact opinion regarding causes of death cannot be given.

Adviced Anatomical Examination and DNA fingerprinting.

Regarding the query put along with the inquest my answer is as follows:

Injuries mentioned at serial No.6 and 7 above are non-surgical and are caused by sharp edged heavy weapon.

221. DNA report sent by DNA Fingerprinting Laboratory at Hyderabad is at Ex-258. It appears from the report that along with the femur bone of the leg recovered at the instance of A-1, blood samples of father and mother of Kartikraj were sent to the laboratory. The finding of the laboratory reads thus:

> "To obtain DNA, sources of all above exhibits were subjected to DNA isolation. Source of exhibit B (femur bone of the deceased) yielded impure DNA, which is not amenable for analysis. Several methods were used to purify DNA, but not succeeded. Hence, source of exhibit B did not give any amplification. Since, DNA from the source of exhibit B is essential for identification, no opinion is being furnished herewith."

It is true that this report does not further the prosecution case. But, we have also noted that opinion could not be given because femur bone yielded impure DNA which was not amenable for analysis. There is however no positive assertion in the report that the femur bone is not that of the son of S. Ramraj and his wife Seetharamraj.

222. In the examination-in-chief, Dr. Wable added that injuries nos.6 and 7 could have been caused by sharp cutting weapons like choppers, sattur,

etc. and the description of the injuries `clean cut and lacerated at places' indicates that the weapon must have been used into and for movement and it must have serrated sharp edges.

223. Mr. Nahar contended that there could have been medical corroboration to the events preceding the death of Kartikraj. But that corroboration is lacking in this case.

224. Mr. Nahar contended that in his evidence, PW-1 has stated that legs of Kartikraj were tied above his ankle with 5 to 6 runs of the rope. His legs were tied at the end of his feet. The evidence establishes that on 8/8/2001 only from 11.00 a.m. to 12.00 noon he was freed for going to toilet. Otherwise all throughout, till he was murdered between about 5.00 p.m. to 9.00 p.m. on 8/8/2001 his legs were tied. Tying was done with nylon ropes and hence there should have been some ligature marks on the leg. Mr. Nahar contended that Dr. Wable has stated in the postmortem notes that skin and soft tissues show changes of decomposition with early adipocere and greenish discolouration of leg and foot. He has admitted that greenish discolouration is just the beginning of the process of decomposition and in case of adipocere, the body retains its natural form so that it can be identified thereafter. He drew our attention to page 182 of Modi's Medical Jurisprudence and Toxicology (21st Edition) where it is observed "It is rare for the whole body to be converted into adipocere but, when this occurs the

body retains its natural form, outline and facial features so well that it may be easily identified years after death. Wounds inflicted on the body before death may also be easily recognized". Mr. Nahar contended that admittedly Kartikraj had consumed alcohol. Consumption of alcohol and adipocere formation whereby soap like substance is formed in the fat of the body check the onset of decomposition. In this case, therefore, the decomposition had just begun. If the prosecution story of tying of legs with nylon rope was true, the doctor would certainly have found ligature marks. Dr. Wable has also stated that moist gangrene occurs in such cases. He has stated that he examined the leg to find out cause of death. He did notice a clean cut circumferential injury at knee point. But he did not notice ligature marks. He also did not notice moist gangrene.

225. Dr. Wable also did not notice any cyanosis. He has stated that in some cases of death by strangulation, there may be purging, emission of semen, discharge of fecal matter and urine but there is no evidence of that. Therefore, death by strangulation must be ruled out.

226. Mr. Nahar further pointed out that the doctor has stated that blood was oozing from the corners of Kartikraj's mouth. There was injury around the neck of Kartikraj and it was slightly bleeding. But the investigating officer has stated in his evidence that string M.A. 57 which was used for tying the neck of Kartikraj had no stains of blood and, therefore, he did not

send it to the chemical analyser. Mr. Nahar contended that non finding of blood on the string M.A.57 also establishes that prosecution story is untrue. Mr. Nahar contended that during investigation till 27/8/2001, it was revealed that murder was committed by using weapons like sickle, katti and hexablade. Even in remand report dated 27/8/2001, it is stated that death was caused by using weapons. By letter (Ex-221), PW-47 pancha – Nitin Sontakke was called for identification of weapons used for murder. Mr. Nahar contended that therefore the theory of murder by strangulation with rope must go.

227. We are unable to accept Mr. Nahar's submissions. It appears from the evidence that the murder was committed on 8/8/2001 between 5.00 p.m. and 9.00 p.m. The leg was discovered between 8.00 p.m. and 9.00 p.m. of the evening of 13/8/2001. Therefore, for about four days, it was lying in the bag. The leg was completely wet, obviously because the bag was lying in the water. There was decomposition. The doctor expressed inability to give exact cause of death. It is true that the doctor has said that there were changes of decomposition with early adipocere and greenish dis-colouration of leg and foot and formation of adipocere and intake of alcohol checks the process of decomposition. He has also said that process of decomposition is slow in water.

228. But in this case alcohol was drunk by Kartikraj upto 12.00 midnight of 7/8/2001. Thereafter, he was tied and he was killed between 5.00 p.m. and 9.00 p.m. of 8/8/2001. Therefore, the effect of alcohol could not have persisted till the time he was killed. So far as adipocere is concerned, Dr. Wable has described it as early adipocere. The extract from Modi's Medical Jurisprudence on which reliance is placed speaks about the adipocere of the whole dead body. It is not clear from this extract whether when early adipocere is found only on a part of the body, that part would retain its natural form, outline and features for long time. Therefore, relying on words like early adipocere and greenish discoloration of the leg and foot, it cannot be said that the ligature marks could have been noticed.

229. That the leg was decomposed can hardly be doubted. It is possible that cyanosis could not be noticed because of decomposition. Though it is tried to be brought on record that cyanosis can be the result of strangulation, the doctor has not been asked about the presence of cyanosis on just a piece of leg. One really does not know from the evidence of the doctor whether after a leg is cut and kept in a bag for about four days and after the decomposition sets in, cyanosis can still be noticed. It is possible that even though there was purging, emission of semen or discharge of fecal matter and urine after strangulation, it might not have left its traces on the leg. Besides, the doctor has stated that in some cases, there may be purging and emission of semen and discharge of fecal matter and urine. That does not

mean that in all cases of strangulation, it should be so. It is quite possible that in the present case, there was no such purging or discharge. In this connection we may quote the extract from Medical Jurisprudence and Toxicology (sixth edition pg. 267) by HWV Cox which the trial court has also referred to. The learned author has said that "The feature of congestion, cyanosis and petechial haemorrhages may be absent in asphyxia and may commonly be present in non asphyxial death." In the circumstances, we will have to reject these submissions of Mr. Nahar.

230. We are not impressed by Mr. Nahar's submission that because in the remand report dated 27/8/2001, it is stated that the death was caused by using weapons or because in letter (Ex-221), there is a reference to the identification of weapons used for murder, it can be concluded that the murder was committed by use of weapons and not by strangulation with rope. Drafting of remand report and letters addressed to the panchas calling them for identification are steps in investigation. At that stage, Investigating Agency has yet to draw its final conclusion. Therefore, some averments made in such documents would not bind the prosecution as regards the nature of the case.

231. Mr. Nahar submitted that absence of blood stains on M.A. No.57, the string used for strangulating Kartikraj, is inconsistent with the prosecution story that Kartikraj was strangulated with the help of string particularly

when PW-1 says that there was slight bleeding. We have seen M.A. No.57. It is a cotton string. It is true that if there was bleeding, ordinarily it should have left stains on the cotton string. But PW-1 has stated that the bleeding was slight. It is quite possible that if there was no profuse bleeding and the string was immediately removed because the head was to be cut, it may not leave any noticeable stains on it. It was argued that M.A. No.57 – cotton string is approximately 37" in length and the circumference of the deceased's neck was 18" and if the string is tied around the neck, there would be only 9" of string on either sides and it would be difficult for a person to grip it and stretch it and kill someone.

232. Our attention is drawn to the evidence of the doctor where the doctor has said that if in such a situation without gripping both ends of the string, the string is pulled, it will slip and strangulation till death is not possible. However, it is pertinent to note that in the re-examination, the doctor has stated that if the string is pulled without tying the loose ends around the hand strangulation is possible. Therefore, the possibility of the accused just pulling the loose ends of the string and strangulating Kartikraj cannot be ruled out. In any case, we find PW-1's account of incident to be acceptable. We have found him to be a credible witness. It is reiterated by the Supreme Court time and again that if there is credible ocular account, the medical evidence recedes in the background. In ***Krishnan & Anr. V. State represented by Inspector of Police (2003) 7 SCC 56***, the Supreme Court

has observed that when the ocular evidence is found to be cogent, consistent and creditworthy, it cannot be discarded merely on the basis of some hypothetical answers of medical witnesses and because of minor variations with medical evidence. Therefore, assuming that there is any inconsistency in the medical evidence, that does not affect the prosecution story adversely. Reliance placed by Mr. Nahar on ***State of U.P. v. Ram Bahadur Singh & Ors., 2004 SCC (Cri.) 1463,*** is misplaced because we do not find any serious inconsistency between medical evidence and oral evidence.

233. According to PW-40 Dr. Wable, the exact opinion as regards the cause of death could not be given. Therefore, he advised anatomical examination and DNA finger printing for ascertaining the cause of death. The DNA report Ex-258 stated that Ex-B Femur bone of the deceased did not give any amplification and since DNA from the source of Ex-B is essential for identification, no opinion could be given. The trial court has, however, come to a conclusion that Kartikraj met with a homicidal death. It was argued that in the facts of the case, since the dead body is not recovered and the DNA report is not conclusive, it cannot be said that the leg which was recovered is the leg of Kartikraj. The prosecution has failed to prove homicidal death as also the cause of death and, therefore, the accused cannot be convicted for murder. We have no hesitation in rejecting this submission. In ***Sevaka Perumal, etc. v. State of Tamil Nadu, AIR 1991 SC 1463***, there was no proper identification of the dead body. It was argued

that since there was no proper identification of the dead body, it was not safe to convict the accused and sentence him to death. The Supreme Court observed that in a trial for murder, it is not absolute necessity or an essential ingredient to establish corpus delicti. The Supreme Court observed that the fact of death of the deceased must be established like any other fact. Corpus delicti in some cases may not be possible to be traced or recovered. It was further observed that if recovery of the dead body is an absolute necessity to convict an accused, in many a case the accused would manage to see that the dead body is destroyed and would afford a complete immunity to the guilty from being punished and would escape even when the offence of murder is proved. The Supreme Court further observed that what is required to base a conviction for an offence of murder is that there should be reliable and acceptable evidence that the offence of murder, like any other factum, of death was committed and it must be proved by direct or circumstantial evidence, although the dead body may not be traced.

234. Similar view was taken by the Supreme Court in ***Rama Nand and others, v. The State of Himachal Pradesh, AIR 1981 SC 738***. The Supreme Court observed that it is true that one of the essential ingredients of the offence of culpable homicide required to be proved by the prosecution is that the accused "caused the death" of the person alleged to have been killed. It must be established that homicidal death has been caused and ordinarily the recovery of the dead body of the victim or a vital

part of it, bearing marks of violence, is sufficient proof of homicidal death of the victim but, clarified the Supreme Court, a blind adherence to this old "body" doctrine would open the door wide for many a heinous murderer to escape with impunity simply because they were cunning and clever enough to destroy the body of their victim. Where the dead body of the victim in a murder case is not found, other cogent and satisfactory proof of homicidal death of the victim must be adduced by the prosecution. The Supreme Court observed that such proof may be by direct ocular account of an eye-witness or by circumstantial evidence or by both. When only circumstantial evidence is relied upon, it should be clinching and of definite character. However, this principle of caution cannot be pushed too far as requiring absolute proof because perfect proof is seldom to be had in this imperfect world and absolute certainty is a myth. It is further observed that the corpus delicti of the fact of homicidal death can be proved by telling and inculpating circumstances which definitely lead to the conclusion that within all human probability, the victim has been murdered by the accused concerned.

235. Same view has been reiterated by the Supreme Court in ***Ramgulam Chaudhary and others v. State of Bihar, (2001) 8 SCC 311*** and ***Mani Kumar Thapa v. State of Sikkim, (2002) 7 SCC 157***. Therefore, assuming that the leg discovered at the instance of A-1 is not the leg of Kartikraj, this court can still hold the accused guilty if it finds that there is clinching ocular

or circumstantial evidence or both which establishes that the accused have committed Kartikraj's murder.

236. Three experts have been examined by the prosecution. PW-21 is Bhalchandra Biradar. His opinion is at Ex-112. Specimen handwriting of PW-1 was sent to him to find out whether PW-1 had purchased sim card by filling application. This fact is not challenged by the prosecution and, hence, it is not necessary to refer to this evidence.

237. The Ballistic Expert PW-27 Nandkumar Rokade has stated that the country made revolver which was recovered at the instance of A-1 was in working condition and the cartridges which were found at his instance were also of the said revolver.

238. PW-37 Dharamraj Chavan is the fingerprint expert. According to him, on 13/8/2001, at about 14.50 hours, on receiving a message from police control room, he contacted P.I. Shinde and accompanied him to the scene of offence in Flat No.5 of Amarpali Society. A-1 was with them. He noticed some bottles and glasses kept in the kitchen. He developed fingerprint on glasses and bottles of liquor with the help of lead powder. He obtained photographs of the fingerprints. He took all the articles in his custody. He developed the film and obtained positive prints of fingerprints obtained in Amarpali Society. He compared them with the fingerprints of

the accused. His opinion is Ex-171. As per this opinion, out of six chance prints, one chance print developed on liquor glass is identical with right index finger print on F.I. slip of A-1. Other chance prints developed on wine bottle are identical with right ring fingerprint on F.I. slip of A-3 and another chance print developed on liquor glass is identical with right thumb print on F.I. slip of A-2. Remaining chance prints did not disclose sufficient numbers of ridges and hence he found them unfit for comparison. The evidence of fingerprint expert conclusively establishes the presence of the accused in the Amarpali flat. There is no effective challenge to this evidence. All that is urged is that, the police had planted the articles on which fingerprints were allegedly found, in the flat. The door of the flat was broke open and articles were tampered with. We find no substance in this contention. We shall deal with this argument a little later.

239. The prosecution has examined PW-45 Kantilal Adsul, the Special Judicial Magistrate, who conducted Test Identification parade of the accused. The memorandum of identification parade is Ex-207. We have carefully perused the evidence of this witness and the memorandum of identification parade. In our opinion, this witness has taken the requisite care while holding the parade, followed the guidelines of the said Manual and conducted the parade with exemplary caution. In the identification parade, PW-28 Usman Chudi Firoz from whom the accused purchased bags on 4/8/2001 identified PW-1 and A-1. PW-15 Rakesh Khandelwal from

whom on 8/8/2001, the accused purchased one bag, identified PW-1 and A-1. Since, PW-16 Salunkhe has been rightly disbelieved, we shall not take that identification into consideration. PW-31 Motilal Sukheja owner of Asha Hardware from whom on 5/8/2001, the accused purchased a koyta identified A-3. PW-6 Shravan Gupta, the watchman of Popular Height Society identified PW-1 and A-1. PW-32 Ajay Chawala, the owner of Minu Hardware from whom the accused purchased hacksaw frame and blades identified PW-1, A-1 and A-3. PW-29 Sanjay Mantri, the owner of Prasad Medical Stores from whom the accused purchased prepaid card for Rs.750/- on 4/8/2001 identified PW-1 and A-1. PW-13 Umakant Kale, the owner of Amarpali flat, who had visited the flat on 8/8/2001 identified PW-1. PW-10 Anjali Dhumal a resident of Amarpali Society who had seen the accused spreading clothes in the gallery for drying in the morning of 9/8/2001 has identified PW-1 and A-1. In our opinion, the identification of the accused at the identification parade inspires confidence. It is significant to note that none of the witnesses have identified A-2. Many of them have only identified PW-1 and A-1 and some have identified A-3. This itself indicates the genuine nature of the parade. If it was a fabricated piece of evidence, all the accused would have been shown to have been identified by the witnesses. We find no difficulty in placing reliance on this evidence.

240. It was argued that PW-5 Rajendra Kendale, PW-7 Pramod Dodake, PW-9 Kamal Prashun, PW-38 Rajeshkumar were not made to identify the

accused in the identification parade. They identified the accused in the court. Their identification in the court should not be relied upon.

241. This argument will have to be rejected. On 7/8/2001, the accused went to PW-5 Kendale's shop in the morning for T.V. and V.C.D. player. They went back and came again with visiting card of Mr. Sant, because Kendale wanted some known person to recommend their case. They were given receipt and asked to return T.V. and V.C.D. player at 9.00 p.m. Again at night, A-1 and Kartikraj came to seek more C.Ds. On 8/8/2001, A-3 and PW-1 returned the articles. Similarly, PW-7 Pramod Dodake interacted with the accused and PW-1 all the time. He made them stay at Kudale Patil Angan Apartment. Then shifted them to Amarpali flat. He visited them in that flat on 7/8/2001. That time, all the accused, PW-1 and Kartikraj were present. He had ample opportunity to interact with them. The accused and PW-1 were staying with PW-9 Kamal Prashun at his flat in Popular Height Society at Pune from 1/8/2001 to 3/8/2001. He also had opportunity to interact with them. The accused and PW-1 stayed with PW-38 Rajeshkumar at the flat in Pereira Housing Society from 9/8/2001 to 12/8/2001. Rajeshkumar also interacted with them during this period. All these witnesses knew the accused and PW-1 on account of their earlier association. That obviously lends assurance to their identification in the court.

242. In ***Ronny alias Ronald James Alwanis v. State of Maharashtra, AIR 1998 SC 1251*** while dealing with similar question, the Supreme Court has held that if witness has known an accused earlier in such circumstances, which lend assurance to identification by him in court and if there is no inherent improbability or inconsistency, there is no reason why his statement in court about the identification of accused should not be relied upon as any other acceptable but uncorroborated testimony. We are of the opinion that this principle would be easily applicable to the present case.

243. Another piece of evidence which lends corroboration to the evidence of PW-1 is the evidence of PW-47 Nitin Sontakke who has conducted identification parade of weapons on 30/8/2001. We have already referred to his evidence. Suffice it to say that in the said identification parade, PW-32 Ajay Chawla identified hacksaw frame as having been sold to PW-1. PW-31 Motilal Sukhija identified koyta (M.A. 11) which was sold by him to A-3. This evidence offers the necessary corroboration to PW-1's evidence about purchase of hacksaw frame and koyta by the accused.

244. Mr. Jamdar, the learned counsel for the accused drew our attention to the defence witnesses' evidence and contended that the trial court has not given due weightage to it. He drew our attention to ***State of Haryana v. Ram Singh, (2002) 2 SCC 426*** and contended that the defence witnesses are

not tainted witnesses and their evidence, if found cogent, needs to be considered as they are on par with prosecution witnesses.

245. We cannot dispute this proposition. We would, therefore, examine what is the nature of the evidence of the defence witnesses. DW-1 Girish Pawar, manager of Idea Cellular Services has stated that series No.98224 is of their company. Mobile phone No.9822427862 was issued from their company on 16/2/2002. This series was started on 31/12/2001. He has produced permission granted to that effect by the Government which is at Ex-320.

246. Our attention is drawn by Mr. Jamdar to the evidence of PW-30, Rushikesh Deshpande, who owns a motor garage. He has stated that on 21/8/2001, he had received information on his mobile phone from his customer that his vehicle was having mechanical fault. He went to the Commissioner's office to repair the motor cycle. One police constable arrived there and asked him whether he was ready to act as a pancha. He assented to it. They went to the office of the Crime Branch. Thereafter, at the instance of A-2, a bag containing weapons was seized from a place near Bund Garden bridge. In the cross-examination, he has stated that his mobile phone number was 98224 27862.

247. Mr. Jamdar pointed out that DW-1 Girish Pawar has stated that series No.98224 was started on 16/2/2002. He submitted that in view of this, PW-30 Rushikesh Deshpande's claim that on 21/8/2001, he received a call on this mobile phone is false. Therefore, panchnama (Ex-135) and memorandum (Ex-136) are concocted documents. Discovery of weapons at the instance of A-2 must, therefore, be disbelieved.

248. This submission of Mr. Jamdar will have to be rejected because in order to examine this submission, we went through the record to check whether, PW-30 Deshpande's original Marathi evidence is correctly translated. The most crucial sentence in original marathi reads as *`MAJA MOBILE PHONE 9822427862 AAHE*'. Correctly translated in English, it should read as My mobile phone is 9822427862. It refers to the present mobile phone number. From this, it cannot be said that on 21/8/2001, his mobile phone no. was 9822427862. This submission must, therefore, fail.

249. DW-2 Abhimanyu Karkhanis is serving in BSNL since 24/7/1998. His evidence is of no use to the defence because he did not produce any record in the court to establish that during 17/4/2001 to 20/8/2001 telephone no.6129842 was not in a working condition. In view of this, we have to conclude that the evidence of defence witness does not help the accused.

250. We shall now turn to a very important circumstance which lends support to the prosecution case. The accused have filed their written statements. We have not the slightest doubt in our mind that the accused have come out with a palpably false defence. Mr. Nahar, the learned counsel for the accused has tried to get over the difficulty created by false defence by placing reliance on ***Bhagirath v. State of Madhya Pradesh, 1975 SCC (Cri.) 741***. In that case, the Supreme Court has observed that "the prosecution can succeed by substantially proving the very story it alleges. It must stand on its own legs. It cannot take advantage of the weakness of the defence. Nor can the court on its own make out a new case for the prosecution and convict the accused on that basis". There can be no doubt about this principle. In this case, the prosecution has proved its case by leading cogent evidence. It does not have to depend on the weakness of the defence. But a palpably false defence cannot be ignored. The Supreme Court is very clear about this. We shall therefore refer to the written statement of the accused.

251. In his written statement A-1 stated that he and PW-1 belong to Samastipur, Bihar. They know each other. He had been to Pune for studies. PW-1 was also staying in Pune at Pimpri Chinchwad. During this time PW-1 was on visiting terms with him. In those days Kartikraj who was his room mate for sometime became their common friend. According to him on 2/8/2001 when he was in his flat at Popular Height

Koregaon, PW-1 phoned him and told him that he and his friends would be staying at Pune for few months and as such he was in need of a flat in Pune. A-1 took him to one Pramod Dodake an Estate Agent on 3/8/2001. PW-1 finalised the deal of one flat at Amrapali Society Yari Phata Pune and occupied it. On 7/8/2001 PW-1 invited A-1 for a party. PW-1 told him that he has also invited by Kartikraj for the party and Kartikraj will collect him. Accordingly Kartikraj came in the evening at Popular Height flat and they went to the flat of PW-1 for the party. On the way to the flat A-1 purchased one bottle of Rum as instructed by PW-1. When PW-1 and Kartikraj reached the flat they saw unknown friends of PW-1 there. They were watching a movie. They started enjoying drinks. During the party PW-1 suggested that they could earn good amount if they pretended to kidnap one of them only for ransom as is shown in some movies. All of them being a little drunk seemed to enjoy the idea. Kartikraj being the only boy whose parents were not too far and as according to him his parents would pay good amount, Kartikraj could be the only person who could play the role of victim. The idea appealed to Kartikraj also. Kartikraj dialed his father's telephone number at Hyderabad from the mobile of PW-1 and handed it over to PW-1. As A-1 was tired he did not wait to hear what PW-1 was saying on telephone and he went off to sleep.

252. Next day i.e. on 8/8/2001 again at 2 p.m. Kartikraj phoned Hyderabad and talked to his brother Santosh Raj pretending that the people who held him may really kill him, if they did not pay money quickly. Every one laughed and congratulated Kartikraj on his acting. At about 4 p.m. Kartikraj and A-1 went to purchase some more liquor. They bought four quarter bottles of Rum. As A-1 had some work to do he dropped Kartikraj to the flat and went to finish his work. When he came to the flat he saw Kartikraj lying near the toilet. Kartikraj was having injury on forehead. PW-1 and his friends looked frightened and worried. A-1 asked them what had happened. PW-1 told him that after Kartikraj brought bottles of rum he drank very fast and got drunk very heavily. He wanted to go to the toilet but he could not walk properly and while coming out of the toilet he slipped and hit his head on the wall. He became motionless.

253. A-1 told them that they should take him to a doctor. PW-1 said that since he had made ransom calls nobody would believe that Kartikraj fell unconscious after drinking heavily. PW-1 then told A-1 that infact Kartikraj was dead and he had confirmed it after checking his pulse. On hearing this A-1 got scared. He told PW-1 that we must inform the police and now the joke has gone too far. PW-1 told him that he has thought about everything. He then told him to go and dispose of the motor cycle of Kartikraj.

254. Accordingly he left the flat under mental stress and fear and he wandered here and there and finally abandoned motor cycle in wee hours of morning. He did not go back to the flat at Amrapali. He whiled away his time and returned to Popular Height's flat after confirming that Kamal Prashun had left for his work. On 9/8/2001 in the evening at about 7-30 p.m., he received a telephone call from PW-1 asking him to come to Dadar immediately and threatening him that, if he did not do so he would inform the police. Due to the threats he went to Mumbai and met PW-1 at Dadar. Thereafter he followed whatever was being told by PW-1 to him. He and PW-1 went to Pereira Housing Society where he saw A-2 and A-3.

255. At Mumbai he was told by PW-1 that he and his other associates had disposed of dead body of Kartikraj; that father of Kartikraj is still ready to pay ransom and he would be sending that amount to Mumbai and that PW-1 will collect that amount. A-1 had no option but to stay with PW-1 and obey him. When PW-1 went to collect the amount of ransom he asked A-1 to stand near Andheri Railway Station. Accordingly when he was standing at Andheri Railway Station. PW-1 came there with police and police accosted him. After he was accosted by police, police asked PW-1 his address. PW-1 told the police that he was staying at Naigaon Mumbai. Thereafter A-1, PW-1 and police went to Pereira

Housing Society, Naigaon at the instance of PW-1. They were both taken in two separate vehicles. From there police accosted A-2 and A-3. All of them were taken to Pune. After they reached Pune, they were taken to the residence of Pradeep Dodake at Kudale Patil Angan, Wadgaon (B) Pune. There police called Pramod Dodake and interrogatged him. Thereafter Pramod Dodake took them to Amrapali flat No. 5. The police broke open the locks and took inspection and thereafter they were taken by the police to the crime branch office. In the crime branch office they were kept separately. At that time police interrogated A-1. A-1 narrated the true facts. Thereafter PW-1 was told by Mr. Shinde that media had given wide publicity to the matter and there was tremendous pressure of media public and supporters and it would not be possible to putforth what had happened in the matter. A-1 was further told by Mr. Shinde that he would proceed to register offence of murder in the matter and asked him whether he would be interested in becoming the approver. A-1 refused the proposal. During police custody A-1's signatures were obtained on several papers and he was made to write few names in the visitors register. When they were shifted to jail PW-1 was kept in a separate cell and he and A-2 and A-3 were kept together. PW-1 used to send them some chits and occasionally used to meet them. During this time PW-1 communicated to them that Mr. Shinde proposes appointment of Mr. Nikam as Special Prosecutor. He also told him that Mr. Shinde used to discuss with PW-1 details of his statement which was to be

recorded before the court and that Mr. Shinde used to explain the details of such statements. A-1 claimed to be innocent.

256. In their written statement A-2 and A-3 contended that PW-1 and they come from Samastipur Bihar. They know each other since prior to 2001. According to them when they learnt that PW-1 would be coming to Mumbai sometime in the last week of July, 2001 they informed PW-1 that they would also go with him. A-2 was desirous of joining computer course and A-3 was desirous of securing job at Mumbai. Acused 2 and 3 along with PW-1 came to Mumbai on 1/8/2001. All of them alighted from train at Kurla Mumbai in the night of 1/8/2001. As train was late they went to the flat of their friend at Pereira Housing Society at Naigaon, Mumbai. On the next day i.e. on 2/8/2001 PW-1 left the said flat for going to Pune for his personal work and told them that he would be back in few days. Thereafter PW-1 returned along with A-1 sometime in the night intervening 9th or 10th of August, 2001. On 12.8.01 PW-1 and A-1 came to Pereira Housing Society flat with police. Both of them were accosted by police and were taken to Pune. According to A-2 and A-3 from 1/8/2001 they never visited and stayed at Pune at any time. They have no concern whatsoever with the crime and that they are falsely implicated by PW-1 with the help of police. PW-1 had deposed against them due to pressure of police to support their false case. PW-1 has

concocted false story to save himself and his associates. They claimed to be innocent.

257. We will examine how false is this defence. A-1 has admitted that Kartikraj was his roommate and as such was known to him; that on 7/8/1981, Kartikraj came to Popular Height Flat; that from there they went to Amrapali Flat; that on the way they purchased a bottle of Rum; that PW-1 was there at the flat with his friends and they started enjoying drinks. It is significant to note that though A-1 claims to be in the company of PW-1, his friends and Kartikraj for a long time, he feigns ignorance about their names. This is unbelievable. At least after Kartikraj's death, he would have ascertained their names. According to him as suggested by PW-1 they decided to earn money by kidnapping one of them for ransom and Kartikraj on his own said that his parents would pay good money and, therefore, he will play the role of the victim. Kartikraj dialed his father for that purpose, but according to A-1 he did not hear the conversation between Kartikraj and his father because he was tired and he went to sleep. It is inconceivable that anyone would offer to be a victim of abduction and phone his father for ransom. Moreover, to disassociate himself from the conversation on phone, A-1 has stated that he did not hear it because he went to sleep. According to him, next day again Kartikraj made a call to his father. Then, he and Kartikraj went to buy liquor. To show that he has nothing to do with the murder, A-1 has stated that he dropped Kartikraj at the flat and went to

finish his work and when he came back he saw Kartikraj lying near the toilet with a head injury. PW-1 told him that Kartikraj got drunk. He could not walk properly and while coming out of toilet he slipped; hit his head on the wall and became motionless. Finding of blood in the flat is not consistent with this defence. If really while enacting a drama Kartikraj was to die due to accidental fall, they would have informed about it to others. His further case is that as directed by PW-1 he took Kartikraj's motor cycle with a view to disposing it off. He was under mental stress and therefore he finally abandoned the motorcycle and did not go to the flat. This also does not appear to be natural. Others would have allowed him to go only on the condition that he would return. He has further tried to create an impression that because of PW-1's threats he went to Mumbai where he was told by PW-1 and his associates that Kartikraj's body was disposed of by them. His going to collect money even after the killing of Kartikraj is explained by him by saying that it was PW-1 who forced him to do so. A-1 has miserably failed to probabalise his defence. Evidence led by the prosecution completely exposes him. His active participation in the crime and his depravity is established beyond doubt. We have no hesitation in holding that he has spinned a false story to hoodwink the court.

258. Equally false and contradictory is the defence of A-2 and A-3. They admit that they left for Bombay with PW-1. But they deny having gone to Pune. According to them they got down at Kurla and went to stay at Parera

Housing Society at Naigaon along with PW-1. On 2/8/2001, PW-1 left the flat for going to Pune and in the night of 9/8/2001 or 10/8/2001, PW-1 came along with A-1. On 12/8/2001, PW-1 and A-1 came to the flat with police and they were accosted. PW-38 Rajeshkumar who was staying in the flat at Pereira Housing Society has denied that A-2 and A-3 stayed at his place from 1/8/2001 to 12/8/2001. He has denied that A-2 and A-3 were arrested from his house on 12/8/2001. Participation of A-2 and A-3 is evident from the evidence. If it is their case that they were not in Pune at the relevant time but were in Bombay or anywhere else, nothing prevented them from leading some evidence to establish their stay in Mumbai or at some other place. We have no hesitation in holding that A-2 and A-3 have also pleaded false defence to mislead the court.

259. In ***Swapan Patra & Ors. V. State of West Bengal, (1999) 9 SCC 242***, the Supreme Court has observed that it is well settled that in a case of circumstantial evidence when the accused offers an explanation and that explanation is found to be untrue, then the same offers an additional link in the chain of circumstances to complete the chain. It is true that in this case, PW-1 being the eye-witness, it cannot be said that this case rests on circumstantial evidence. But we can certainly hold that the false evidence of the accused must be taken note of because it is an attempt to hoodwink the court. Adverse inference will have to be drawn against the accused.

260. In his statement recorded under section 313 of the Code, A-1 has either denied the prosecution case or not admitted it. When major incriminating circumstances were put to him, he has falsely denied them or falsely not admitted them. He has stated that he did not know the whereabouts of Kartikraj. Likewise, A-2 and A-3 have also either falsely denied or falsely not admitted the incriminating circumstances. They have admitted that they boarded the train at Patna for Mumbai with PW-1 but they have falsely stated that they did not go to Pune but they went to Naigaon. A-3 has stated that he is submitting his say separately. A-2 stated that he wanted to examine officer from A.T.&T. to verify the mobile number series and an officer from B.S.N.L. to verify phone number 6129842 of Pune. We have already adverted to the defence witnesses whose evidence, in our opinion does not help the accused. It is necessary to see what is the effect of falsity of defence and false explanation or false answers being offered by the accused in their statement recorded under section 313 of the Code.

261. In ***State of Maharashtra v. Suresh, (2000) 1 SCC 471***, the Supreme Court has held that a false answers offered by the accused when his attention was drawn to a circumstance, renders that circumstance capable of inculpating him. In ***Anthony D'Souza & Ors. V. State of Karnataka (2003) 1 SCC 259***, the Supreme Court has observed that where an accused offers false answer in his examination under section 313, against the

established facts, that can be counted as providing a missing link for completing the chain. Though these judgments refer to cases which are based on circumstantial evidence there is no reason why their ratio cannot be applied to this case to draw adverse inference against the accused and to hold that established circumstances which have been falsely denied by them are rendered capable of inculpating them.

262. It was argued by Mr. Nahar that there are various defects in the investigation. Those defects cannot be explained merely as mistakes. They indicate that the prosecuting agency has fabricated evidence. The investigation is a tainted investigation. The prosecuting agency has fabricated evidence in its anxiety to create an impression that it has acted promptly and efficiently. Fabrication of evidence is done because the prosecuting agency was working under the pressure of public, media and its superiors.

263. It is undoubtedly true that there are some mistakes committed by the investigating agency. There are certain discrepancies which do show negligence or remissness of the investigating agency. But that has not affected the core or the substratum of the prosecution story. Nothing has been brought on record to show that police officers had any enmity with the accused. There is no evidence on record about any media hype or alleged pressure brought on the police by their superiors or by the public.

Therefore, we cannot accept the submission that because of the said pressure, police have concocted a false case. We are unable to come to a conclusion that the investigation is tainted. One cannot lose sight of the fact that investigation of this case was an uphill task. The police had to cover a wide area, work on various leads, get evidence from different corners and synchronize it. In an investigation of such magnitude, some mistakes do take place. Though lapses cannot be justified, unless they are of a serious nature and there is evidence of the investigating agency trying to create evidence with oblique motive to involve innocent people, criminals cannot be let off on the ground of mistakes in investigation if the core of the prosecution case remains in tact despite the said mistakes. Even in cases where there is tainted investigation, the Supreme Court has sounded a word of caution to the subordinate courts, asking them to desist from acquitting criminals on the ground of mistakes in investigation.

264. In ***Ram Bihari Yadav v. State of Bihar (1988) 4 S C C 517***, the Supreme Court was dealing with a case where the investigating officers had designedly committed gross mistakes. The Supreme Court observed that in such cases, the story of the prosecution will have to be examined dehorse such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and

this would obviously shake the confidence of the people not merely in the law-enforcing agency but also in the administration of justice.

265. In ***Dhanaj Singh @ Shera & Ors. v. State of Punjab, AIR 2001 SC 1920***, the investigation was faulty. However, the High Court had weighed the evidence carefully and come to an independent conclusion about the guilt of the accused. The Supreme Court endorsed the High Court's view and held that in case of a defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.

266. In ***State of U.P. v. Hari Mohan, AIR 2001 SC 142***, the Supreme Court reiterated the same view and held that the defective investigation cannot be made basis in acquitting the accused, if despite such defects and failures of the investigation a case is made out against all the accused or any one of them.

267. In ***Sahadevan's case (supra)***, the Supreme Court referred to its judgment in ***Ram Bihari's case (supra)*** and held that the benefit of an act or omission of the investigating agency should not go to the accused in the interest of justice. Therefore, in this case, if we find that there are

any defects in the investigation in the interest of justice, we will have to peruse the evidence independently and find out whether despite the said defects, a case is made out against the accused. Giving undue importance to such defects may in some cases where there is ample evidence on record against the accused result in unmerited acquittals However, we will have to be satisfied that there is ample evidence on record to connect the accused to the crime despite the said mistakes. We will now examine Mr. Nahar's submissions about mistakes committed by the investigating agency which according to him has discredited the entire prosecution case.

268. Mr. Nahar pointed out that though API Lotlikar has stated that till 12/8/2001, he had no idea as to whether Kartikraj was dead or alive, in the panchnama of the personal search of the accused conducted outside the Andheri Railway Station on 12/8/2001 between 12.45 to 21.30 hrs. the police have mentioned sections 302, 201 and 120-B of the IPC. If API Lotlikar has no idea as to whether Kartikraj was dead or alive, then there was no reason for him to mention sections 302, 201 and 120-B in the panchnama dated 12/8/2001 (Ex-189). Mr. Nahar further contended that under panchnama (Ex-189), the police allegedly seized some articles from the accused and those articles have been shown to have been returned to the accused. The police have made arrest panchnama (Ex-197) on 13/8/2001 between 11.30 to 1.00 p.m. at Pune under which the accused have been

shown to have been arrested and the articles are again shown to have been recovered from them. Mr. Nahar contended that this is an unusual practice which casts a shadow of doubt on the credibility of both these panchnamas. According to him, both these panchnamas are concocted. Mr. Nahar contended that PW-1 had admitted that A-1 had been arrested at Andheri. He has stated that P.I. Shinde was at Juhu Chowpati. Therefore, there is no question of their arrest again in Pune on 13/8/2001 by P.I. Shinde. Mr. Nahar contended that as soon as a suspect is apprehended and his liberty is curtailed, he is arrested within the meaning of the word "arrest" under the Code. In this case, in fact, the accused were arrested on 12/8/2001 but they were produced before the concerned Magistrate, for the first time, only in the afternoon of 14/8/2001. He contended that therefore the production of the accused in the afternoon of 14/8/2001 was illegal and violative of their fundamental rights. Mr. Nahar contended that the evidence of PW-1 and other attendant circumstances lead to the conclusion that the accused were arrested on 12/8/2001. It renders the defence version probable that PW-1 and A-1 were arrested on 12/8/2001 at Andheri; from there they were taken to Pereira Housing Society flat at Naigaon where A-2 and A-3 were picked up; from there they came to Kudale Patil Angan; from there with Dodake, the police visited Amarpali flat; broke open the flat; planted articles having fingerprints of the accused in the flat and, thereafter, they were taken to the Crime Branch, Pune. Mr. Nahar contended that panchnama (Ex-100) which pertains to Amarpali flat drawn on 13/8/2001 and which is alleged to have

been conducted between 14.45 to 18.30 hours was also fabricated. That, the police broke open the lock of Amarpali flat is evident from the panchnama (Ex-189) which says that keys of the Amarpali flat were seized from A-1. In fact, PI Shinde has, in his evidence, stated that Amarpali flat was opened with the same keys and after completion of the panchnama, he put the same lock at the entrance of the flat. PW-13 Umakant Kale, the owner of the flat has stated that when he went to the flat in the month of June/July, 2002, there were two locks put on the two doors of his flat but they were not the same which he had fixed on the doors. Mr. Nahar contended that, in fact, API Lotlikar has admitted in his evidence that on 12/8/2001, when he was at Andheri Railway Station, he had received information about the Pereira Housing Society flat at Naigaon and Amarpali Society at Vadgaon. Therefore, it is reasonable to expect the police to visit both these places immediately thereafter. The case of the police that panchnama (Ex-100) which pertains to Amarpali flat was drawn on 13/8/2001 is obviously false.

269. We must note our displeasure about the unhappy handling of this crucial part of the investigation. We feel that the police could have handled it in a better manner. But, we do not see any manipulation of record by the police. PW-2 has stated in his evidence that the accused were arrested at Andheri but if we consider the other evidence on record, it is clear that the word “arrest” has been used by him loosely because the arrest was in fact effected on 13/8/2001. In this connection, it is necessary to refer to the

evidence of API Lotlikar, who has stated that after the accused were nabbed at Andheri, their personal search panchnama was prepared between 8.00 to 8.30 p.m. to ascertain whether they were carrying any weapons. According to him that night, the accused took them to Lohgaon Viman Nagar Area in search of Kartikraj. He has stated that they went to Lonavala by Express Highway from Panvel. They reached Lonavala at night 2.00 a.m. At Lonavala as well as in Viman Nagar area also, they searched for Kartikraj. They realised that A-1 was misleading them about the whereabouts of Kartikraj. Therefore, in the morning of 12/8/2001 at 10.00 a.m. they produced all the accused before P.I. Shinde. He has explained that mentioning of sections 302, 201 and 120-B in panchnama (Ex-189) is a mistake. There is no reason to doubt this statement of API Lotlikar because PW-53 Shinde has stated in his evidence that on 12/8/2001 in the morning API Lotlikar came to his office and told him that he was required to go to Dadar for a trap. Thereafter, he left for Dadar with API Yadav and other police staff. On 13/8/2001, in the morning at 10.00 a.m., API Lotlikar brought the accused to his office. He interrogated A-1 and then arrested the accused and added sections 302, 201 and 120-B of the IPC in the FIR; made entries in the case diary and submitted it to the superiors. He made panchnama (Ex-197) and seized muddemal properties from the accused. PW-1 has obviously made a mistake when he stated that P.I. Shinde was at Juhu Chowpati. PW-52 API Yadav has also corroborated API Lotlikar and PI Shinde. Therefore, panchnama (Ex-189) was prepared at Andheri on the

night of 12/8/2001 between 12.45 and 21.30 hours. Under this personal search panchnama, certain articles were seized and they were returned to the accused. PW-42 Santosh Nair, the pancha has supported this fact. The accused were then produced before PI Shinde on 13/8/2001. Panchnama (Ex-197) was prepared on 13/8/2001 between 11.30to 13.00 hours at Pune by PI Shinde. Pancha PW-44 Sudhakar Deshmukh has supported this. Under panchnama (Ex-197) again articles were seized from the accused. Thereafter, A-1 led the police to the Amarpali flat where panchnama (Ex-100) was drawn between 14.45 to 18.30 hours. Pancha PW-17 Shaikh has also deposed about this. We are not impressed by Mr. Nahar's submission that the accused were arrested on 12/8/2001 but they were not produced before the Magistrate within 24 hours and, therefore, their constitutional rights are affected. The above evidence establishes that no arrest was effected on 12/8/2001. In fact, no arrest could have been effected at that stage because, the complaint lodged by PW-2 was against unknown persons. API Lotlikar has stated that he had information about Amarpali flat and Pereira Housing Society flat at that stage. It appears that the police were not sure that the accused were the perpetrators of the crime. The reason why the accused were searched has been given by API Lotlikar. He has stated that personal search of the accused was carried out to find out whether they had any weapons. Mentioning of section 302 in panchnama (Ex-189) is an obvious mistake because if the police were sure about the death of Kartikraj then, there was no question of the police visiting various

places on the night of 12/8/2001 in search of Kartikraj. It is only when the police felt that the accused were not telling the truth that they produced them before PI Shinde and PI Shinde arrested them.

270. In this connection, we may usefully refer to the judgment of the Supreme Court in ***Joginder Singh v. State of Uttar Pradesh, 1994 Cri.L.J. 1981***, where the Supreme Court has held that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bonafides of the complaint and the reasonable belief as to the person's complicity. We are of the opinion that the police could not have placed the accused under arrest on 12/8/2001. It is only when PI Shinde interrogated A-1 and he was certain that Kartikraj was killed that he effected the arrest. Therefore, we do not find anything wrong in the course of action followed by the police. We are also not impressed by the argument of Mr. Nahar that the police went to Amarpali flat; broke open the lock and tampered with the articles which were lying there. It is true that panchnama (Ex-189) mentions that Amarpali flat keys were seized from A-1 on 12/8/2001. It is true that API Lotlikar has stated that on 12/8/2001, he had information about Amarpali flat as well as Pereira Housing Society flat but, we cannot presume from this that the police went to Dodake's house; from there with Dodake they went to Amarpali flat; broke open the flat and planted articles there. First of all, if the police had keys of Amarpali flat with them, there was no reason for them to break open the lock. Relying on

PW-13 Umakant Kale's evidence, it is argued that the lock must have been broken open because PI Shinde has stated that Amarpali flat was opened with the keys which were seized from A-1 and after completion of the panchnama, he put the same lock at the entrance of the said flat and when PW-13 Umakant Kale went to the flat in the month of June/July, 2002, according to him, the same lock was not on the door. If it is accepted that PI Shinde opened the flat with keys which he had taken from A-1, there could have been no breaking of the lock. It is at that stage that the panchnama was drawn of the scene of offence (Ex-100) and articles having fingerprints of the accused were taken charge of. With the same keys, the house was locked. The theory of breaking open of the lock must, therefore, be rejected. If PW-13 Umakant Kale's evidence is accepted that he had seen some other lock, that obviously would pertain to a period between the drawing of panchnama (Ex-100) and June/July, 2002. During this period, there was no reason for the police to break open the flat because they had already drawn panchnama on 13/8/2001 by opening the flat with the key which A-1 had. This submission of Mr. Nahar will have to be, therefore, rejected. We are also not impressed by the submission that the police who knew about the Pereira Housing Society flat and Amarpali flat must have gone there with the accused in the night of 12/8/2001. We would refrain from imagining things. Why the police did not go to Pereira Housing Society flat or Amarpali flat in the night of 12/8/2001 is not for us to say. The police have their own strategy in investigation. In the absence of any

evidence that the police acted with any malafide intent or oblique motive, we are unable to accept such submissions.

271. Mr. Nahar drew our attention to Chapter V of the Bombay Police Manual (for short, "the said Manual") which lays down detailed procedure regarding investigation. Mr. Nahar contended that the police officers were duty bound to conduct the investigation by following the procedure laid down in the said chapter but they have not done so. He submitted that this chapter begins by emphasizing that investigation has to be imparted. He drew our attention to Rule 203 which talks of illegality of Nazarqaid. He contended that by keeping the approver under surveillance the police have committed an illegality.

272. Mr. Nahar then drew our attention to the evidence of PW-53, P.I. Dilip Shinde. P.I. Shinde has admitted that when the accused were in custody their photographs were obtained. However, the photographs were not sent to Modus Operandi Cell. Mr. Nahar drew our attention to Rule 199 of the said Manual, which says that previous sanction of the Deputy Inspector General of Police will have to be obtained before taking photographs of prisoners. He also drew our attention to section 5 of the Identification of Prisoners Act, 1920 where order of the Magistrate is required before a person's photograph is taken for the purpose of any investigation. Mr. Nahar contended that there is no evidence to establish

that any such permission was taken by the investigating agency before taking photographs of the accused. Misuse of photographs, therefore, cannot be ruled out.

273. Mr. Nahar took us to Rule 228 of the said Manual which speaks of maintenance of diaries by Assistant and Deputy Superintendent of Police. He submitted that police officers are required to maintain the diaries which should contain the details of their movements and their actions. In this case, API Lotlikar has admitted that he had not maintained diary for the relevant period. No diaries maintained by the police are produced on record. This casts a shadow of doubt on the investigation. The investigating agency has committed breach of all the relevant provisions of the said Manual and, therefore, according to Mr. Nahar, the investigation is suspect.

274. There can be no doubt that the police officials must maintain diaries from which their movements and actions could be ascertained. It is true that API Lotlikar has stated that he has not maintained diary for the relevant period. Such negligence must be avoided. But in the facts of this case, we do not think that something more can be read into this. So far as allegation of constant surveillance on PW-1 is concerned, PW-1 has denied this allegations. Assuming prior permission to photograph the accused was not taken, there is no evidence to indicate that the photographs of the accused were misused. Similarly, from non-production of photographs or

videographs of the scene of offence also adverse inference cannot be drawn against the prosecution because we have before us cogent, ocular and circumstantial evidence which speaks about the scene of offence.

275. The argument that statements of neighbours or the hotel owners frequented by the accused were not recorded or, if recorded, they were not forwarded to the court, must also be rejected. It is not necessary for the prosecution to multiply witnesses. The prosecution has to lead evidence of such witnesses, who would unfold its story before the court. The prosecution has examined Anjali, who was the neighbour of the accused when they were staying in Amarpali Society. It must be remembered that as many as 53 witnesses have been examined by the prosecution. Hence, this submission must also be rejected.

276. Mr. Nahar then contended that PW-1 has not disclosed the names of the shop owners from whom the weapons and other articles were purchased. PW-53 P.I. Shinde has stated that he prepared the sketch maps of the spot of the shops from where the weapons and other articles were produced. He deputed police officers with the said map to trace the shop owners. Mr. Nahar contended that this is an artificial story. The map drawn by P.I. Shinde is not on record. He submitted that the police must have taken the accused to the shopkeepers because otherwise it is impossible to locate the

shops. Therefore, the identification of the accused made by the shopkeepers must be disbelieved.

277. We are unable to draw such inferences. We cannot doubt PW-53 P.I. Shinde when he says that he adopted a particular procedure. It is for the police to choose the mode of investigation. Unless there is any flouting of rules or regulations, actions taken by the police in investigation cannot be questioned in this manner. Such approach will frustrate every investigation. We reject this submission.

278. Mr. Nahar pointed out that P.I. Shinde has stated that a piece of flesh having heir which was seized from Flat No.5 of Amrapali Society was sent for D.N.A test to Hyderabad. However, in the forwarding letters (Ex-257 and Ex-259), there is no mention of piece of flesh. P.I. Shinde has stated that due to oversight he might have forgotten to mention it in the forwarding letters. In the D.N.A. report forwarded by Hyderabad Laboratory, there is also no mention about the piece of flesh. Mr. Nahar contended that this affects the credibility of the prosecution case.

279. We are not impressed by this submission. It is true that whether the piece of flesh was sent or not is not very clear. There appears to be some discrepancy in this regard. But since D.N.A. report does not refer to it at all there is no question of the accused being prejudiced by it. The police did

send the leg recovered at the instance of A-1 to the Hyderabad laboratory and that report is on record.

280. Mr. Nahar further pointed out that PW-50 Santoshraj, the brother of Kartikraj had given three mobile numbers to the police. Those numbers are apart from those mentioned in the Fax. But the police have not made any investigation about those phone numbers. This submission does not impress us. It is true that the police have committed some minor mistakes while investigating this crime, but one certainly cannot accuse them of inaction. It appears to us that they have worked on practically every lead they got during the investigation. It is not for us to enter the arena of investigation and hold that further investigation should have been directed in a particular direction when we feel that the police have collected adequate evidence to bring home the guilt of the accused. Mr. Nahar then pointed out that the identification parade was held on 21/9/2001. However, in Ex-279, which is remand report dated 4/10/2001, it is stated that the identification parade is not held. Mr. Nahar contended that therefore the test identification parade evidence is a fabricated piece of evidence. In our opinion, this is a mistake because in the further remand report (Ex-280) dated 18/10/2001, it is stated that the identification parade has been held. No adverse inference can be drawn against the prosecution from this.

281. Mr. Nahar further contended that the prosecution tried to suppress a vital piece of evidence. The copy of the D.N.A. report was not given to the defence till the examination-in-chief was over. Ultimately on 1/8/2002, the defence made an application for D.N.A. report. At that time, the Special Public Prosecutor stated that the prosecution did not want to rely on the D.N.A. report and it was produced on 2/8/2002. Mr. Nahar submitted that because the D.N.A. report is inconclusive, a concerted effort was made to see that D.N.A. report does not reach the defence. We find no merit in this submission because the cross-examination began on 2/8/2001 and before that admittedly a copy of the D.N.A. report was made available to the defence. No prejudice is caused to the accused. Having considered all submissions of Mr. Nahar relating to lapses in investigation in the light of aforestated judgments of the Supreme Court, we conclude that though mistakes are committed by the police, they do not affect the substratum of the prosecution case. There is no fabrication of evidence. Investigation is not tainted.

282. It was argued that Kartikraj was a tall, strong and hefty person. Witnesses have described him as a fat person. Therefore, when the accused tried to tie his hands and legs with rope he would certainly have resisted. PW-1 has stated that from 11 a.m. to 12 noon on 8/8/2001 he was freed to go to toilet. At least during this time he would have shouted for help. It is the case of the prosecution that the owner of the flat Umakant Kale came

to the flat in the afternoon. At that time Kartikraj was kept in one of the rooms. The room was locked from inside. The learned counsel contended that it is surprising that Umakant Kale, who was there in the flat for sometime and went around the flat did not hear even a whimper of Kartikraj. Therefore, according to the learned counsel the story that Kartikraj's hands and legs were tied and that his mouth was also tied with a napkin is false. We are unable to accept his submission.

283. Assuming Kartikraj was a hefty person one cannot forget that the accused were four in number. They had with them weapons like koytas, hacksaw blades and revolver. Initially when Kartikraj was tied with rope admittedly Kartikraj was heavily drunk. So it must not have been difficult for the four accused to tie him with ropes and napkin. Kartikraj might not have been in a position to scream. It is evident from PW-1's evidence that the accused were constantly threatening Kartikraj with weapons in their hands. Revolver and koytas were aimed at his head. In such a situation even if Kartikraj were to give a muffled cry, the accused would have attacked him or caused some grievous injury to him. It is difficult for a lone person trapped in strange surroundings in a room and surrounded by the accused who were brandishing weapons at him to raise any cries.

284. In the circumstances the neighbours or Umakant Kale could not have heard cries of Kartikraj. We are unable to hold that because Kartikraj's cries were not heard by any one the prosecution story has become inherently improbable. We reject this submission.

285. Mr. Nahar contended that the prosecution case based on the evidence of PW-1 that Kartikraj was kept in bedroom No. 2 with his hands and legs tied with ropes and his mouth tied with a napkin and that room was locked from inside when the flat owner PW-13 Mr. Kale visited the flat at about 4 p.m. on 8/8/2001 must fall to the ground because it is not supported by PW-13 Mr. Kale. It is, therefore, obvious that PW-1 is not telling the truth.

286. We will examine this submission. PW-1 has stated that on 8/8/2001 at about 4 p.m. somebody knocked at the door. A-1 told him that he would lock from inside, the room in which Kartikraj was kept, and, if anybody asks anything about him, he should be told that he had gone to Kalyan. Thereafter, A-1 and A-2 locked themselves inside the room in which Kartikraj was kept. The main door was then opened and the owner of the flat walked in. He wanted to remove his pillow from his room which he had kept locked. He could not locate it. He asked PW-1 why one room was locked. PW-1 told him that his friend was staying in the

locked room and he would be returning from Kalyan on the next day in the morning. He told PW-1 to remove the pillow from the locked room. He left the flat.

287. PW-13 Mr. Kale was shown map Ex-47. Referring to the map he has stated that he had kept his belongings in the room marked by letter "I". The said room was locked. He has confirmed that on 8/8/2001 at 4 p.m. he went to his flat. When he pressed the bell a boy opened the door. Referring to bedroom no. II in map Ex- 47 he has stated that the boy who was not present was in possession of the said room. In the cross-examination he has stated that he had a talk with a boy in the passage in front of W.C. and bathroom. But again under the pressure of cross-examination he has stated that he did not have a talk with him in the passage but he had a talk with him when he was in bedroom No. II. In further cross-examination he has stated that it was possible for him to take inspection of entire flat without opening the room in which he had kept his belongings. On the basis of this it is argued by Mr. Nahar that the story that bed room No. II was locked and that Kartikraj was kept there is false.

288. We have no hesitation in rejecting this submission. It is absolutely clear that a mistake committed by PW-13 Kale under pressure of cross-examination is tried to be used by the defence to discredit PW-1. This

is evident from the fact that immediately after saying that he had a talk with the boy in bedroom No. II, he has further stated that he had gone to the passage upto the rear portion of bedroom No. II. He has further stated that there is a door and one window towards the rear portion of bedroom No. II and he had been to the extreme end of the passage for taking inspection. Admittedly there is common balcony which goes around the flat. If Mr. Kale had gone inside bedroom No. II, there was no reason for him to refer to the door and window at the rear portion of bedroom No.II and to add that he had gone to the passage upto the rear portion of bedroom No. II i.e. to the extreme end of the passage (balcony surrounding the flat) for taking inspection. Obviously therefore, PW-13 Kale's first statement that he had a talk with the boys in the passage is the correct statement. Nothing much can be read into the statement made by this witness that it was possible for him to take inspection of the entire flat without opening the room in which he had kept his belongings. If one has a look at map Ex. 47 it is clear that even, if bedroom No. 1, wherein belongings of Mr. Kale were kept, is not opened, it is possible to take inspection of the entire flat by opening door Z of room A. PW-13 Kale has, therefore, made a correct statement. It is a general statement. From this statement it cannot be inferred that Mr. Kale stated so because bedroom No. II was not locked on 8/8/2001. PW-13 Kale has identified PW-1 in the identification parade as person present in the Amrapali flat on 8/8/2001. His evidence, in our opinion, establishes that on 8/8/2001 at 4

p.m. PW-1 along with one person was at the Amrapali flat and to that extent PW-1's version gets corroborated.

289. Mr. Jamdar, learned counsel for A-2 and A-3 adopted the legal submissions of Mr. Gupte and Mr. Nahar. Relying on ***Niranjan Singh's case (supra)*** Mr. Jamdar contended that, if the evidence of the approver is found to be reliable, so far as the accused on trial are concerned, he must implicate them in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. In this case, according to Mr. Jamdar, there is no corroboration to the version of PW-1 so as to implicate A-2 and A-3 beyond reasonable doubt. He has pointed out several instances of the alleged false implication of A-2 and A-3. Many of them we have already dealt with. We shall refer to those which we have left out. Mr. Jamdar pointed out that PW-6 Shravan Gupta watchman of Popular Heights Society has not identified A-2 and A-3 in the identification parade. In his police statement he has given description of the accused but in the court he has denied that he even gave description. We do not attach much importance to this. It is a fact that in identification parade this witness has identified only PW-1 and he knew A-1 because A-1 was PW-9 Kamal Prashun's relative. His evidence is useful to establish that A-1 and PW-1 stayed at Kamal Prashun's house with two other persons. The above discrepancy does not discredit him.

290. Mr. Jamdar contended that the story that at the instance of A-1 bag M.A. 10 containing human leg was recovered must be rejected. He pointed out that PW-28 Mohammad Chudi Firoz owner of Classic Bags' shop has stated that he could identify it because it was sold by him. However, in cross-examination it has been brought on record that he has stated before the police that the bag was shown to him by the police. PW-25 Mohammad Mumtaz has said that he used to send rexin bags for screen printing to Yakub Shaikh. He used to sell his bags to Classic Bags of Usman Seth. He has said that M.A. 10 was manufactured by him. PW-53 PI Dilip Shinde had sent M.A. 10 with the mould seized from Yakub Shaikh to PW-21 Bhalchandra the handwriting expert. His report is at Ex-112. He has opined that design, size and shape of printing on bag M.A. 10 is different from the printing mould. Mr. Jamdar contended that therefore, M.A. 10 is not the bag sold by PW-28 Mohammad Firoz. The entire story is concocted.

291. We find no substance in this submission. PW-25 has said that he identified M.A. 10 on the basis of style of stitching. He has not specifically stated that M.A. 10 was sent to Yakub Shaikh for screen printing. Yakub Shaikh is not examined. It appears that the police had shown M.A. 10 to PW-28 Usman Firoz. But he has also said that he could identify M.A. 10 because it was sold by him. Moreover he has identified PW-1 and A-1 in the identification parade as well as in the court as the

persons who had purchased M.A. 10 from him. We, therefore, do not find that evidence of this witness deserves to be discarded as untrue.

292. Mr. Jamdar further contended that PW-38 Rajeshkumar who was staying at Pereira Housing Society at Naigaon has stated about the discovery of blood stained clothes at the instance of PW-1. Mr. Jamdar contended that discovery at the instance of PW-1 will not bind others. Besides the room was accessible to everybody and hence this discovery should not be accepted. Mr. Jamdar contended that all discoveries in this case are from open places which are accessible to people. Relying on ***State of Maharashtra v. Ram Singh (2002) 2 S C C 426*** Mr. Jamdar contended when a fact is once discovered from information received from another source there can be no discovery again even if any information relating thereto is subsequently extracted from the accused. Mr. Jamdar contended that all discoveries in this case are manipulated. He laid stress on the observation of the Supreme Court that "the protection afforded by Section 25 and 26 should not be dependent on the ingenuity of the police officer in composting the narrative conveying the information relating to the alleged recovery of a fact".

293. We, however, do not find any evidence of manipulation by the police and therefore, the discoveries cannot be disbelieved. There is no evidence on record to show that room in Pereira Housing Society was

accessible to all. Assuming that the places from where certain articles were discovered were accessible to people on that ground discoveries cannot be disbelieved. In ***State of Himachal Pradesh v. Jeet Singh (1999) 4 S C C 370***, the Supreme Court has made it clear that, if the article is recovered from a place which is open and accessible to others evidence of recovery is not vitiated merely because of that. The test is not whether the place was accessible to others but whether it was ordinarily visible to others. Fact discovered embraces place of recovery and knowledge of the accused as to it and not the object recovered.

294. We are of the opinion, that the above observations of the Supreme Court will be applicable to the present case. In this case the open places from where articles have been recovered are not ordinarily visible to others. We have no hesitation in accepting the said evidence. Discoveries at the instance of PW-1 would be one of the many circumstances which will have to be considered along with discoveries made at the instance of A-1, A-2 and A-3.

295. There are certain witnesses who have not identified A-2 and A-3. In fact A-3 has not been identified by any witness in the identification parade. But then that does not mean that there is no other evidence against them. We have already referred to the nature of evidence. There are discoveries made at the instance of A-2 & A-3. Their finger prints have

been found in the articles found in flat No. 5 at Amrapali Society. Blood of A group has been found on the articles recovered at the instance of A-2. There is enough corroboration to PW-1's evidence as regards role of A-2 and A-3 from the other evidence on record. It is argued that certain witnesses have only identified A-2 & A-3 in the court. They were not made to participate in identification parade. We have already dealt with this point on the basis of Supreme Court's judgments. Most of the witnesses who have identified A-2 and A-3 in the court have interacted with them for a long time. Their association with A-2 and A-3 has obviously led to their identification in the court. No fault could be found with this identification. It is in fact a clinching piece of evidence against A-2 and A-3.

296. Mr. Jamdar pointed out certain other minor discrepancies in the evidence of witnesses. We find them trivial. We are of the opinion that, if the entire evidence is read in its proper perspective, the complicity of A-2 and A-3 is clearly discernible. Our attention is drawn to ***Kaliram v. State of Himachal Pradesh, 1974 Cri.L.J. 1(S.C.),*** where the Supreme Court has held that if two views are possible, the view which is favourable to the accused should be adopted. If reasonable doubt arises, benefit of that cannot be withheld from the accused. But this is not a case where two views are possible and therefore it is not possible to consider Mr. Jamdar's submission that benefit of doubt should be given to A-2 and A-3.

297. Having gone through the evidence of PW-1 and the other evidence on record, we are of the opinion that the prosecution has proved its case to the hilt. We have no doubt that PW-1's evidence can be relied upon. He has made a complete and truthful disclosure of all the events. There may be some additions of details in his evidence which is natural because he had to make a complete disclosure, but there are no serious discrepancies or contradictions which make him unreliable. His statement is inculpatory. Material portions of his evidence are sufficiently corroborated by other evidence on record. Other evidence on record provides independent corroboration qua each accused so as to prove their involvement beyond reasonable doubt. Taken as a whole and in the light of facts and circumstances of the case, we find approver's version to be credible. We have already dealt with the circumstances in which he was arrested, how he became a participant in the crime, what role he has played in the crime and how he decided to become an approver. Examined from all angles, we feel that PW-1 has established that the main architect of the conspiracy is A-1. It was hatched by all the accused and carried out as per the directions of A-1. A-1 showed extreme depravity in cutting the dead body and ensuring that it is disposed of. The lust for money continued till the accused were arrested. We, therefore, hold that the prosecution has brought home guilt to the accused.

298. The learned A.P.P. Ms. Kejriwal has urged that there is enough evidence on record to indicate that A-2 and A-3's role is equally culpable and, hence, their sentence be enhanced to death sentence. She submitted that the punishment awarded is shockingly inadequate. She relied on the judgments in ***Simon & Ors. v. State of Karnataka, 2004 AIR SCW 859*** and ***Suna alias Rameshchandra Mohanty v. State of Orissa (1976) 4 SCC 307***.

299. We are unable to agree with the learned A.P.P. Though it is true that A-2 and A-3 have actively participated in the crime, the brain behind it is A-1. A-2 and A-3 have carried out the dictates of A-1. This is a mitigating circumstance. Hence, we are not inclined to enhance the sentence. We dismiss the enhancement appeal being Criminal Appeal No.874 of 2004 filed by the State of Maharashtra. In view of our finding that the prosecution has proved its case against A-2 and A-3, we find no merit in Criminal Appeal No.869 of 2004 filed by A-2 and A-3 against their conviction and we dismiss it. We confirm the sentence imposed on them by the trial court.

300. We have also come to a conclusion that the prosecution has proved its case against A-1. The question is whether the death sentence awarded to him should be confirmed.

301. We have heard Mr. Gupte, the learned counsel for A-1. He submitted that the present case does not fall in the category of rarest of rare cases. Mr. Gupte referred to the judgment of the Supreme Court in ***Machhi Singh & Ors. v. State of Punjab, (1983) 3 SCC 470***. In that case, as a result of a family feud the accused-appellants, with a motive of reprisal, committed 17 murders in five incidents occurring in the same night. The victims were asleep in night when the accused persons forcibly entered their respective houses and fired gunshots and inflicted kripan blows on them. The helpless victims offered no resistance and all of them, except the three, succumbed to their injuries. The trial court sentenced four of the accused to death and the rest to life imprisonment. The High Court confirmed the conviction and sentence. Allowing the appeal of one Mohinder Singh on benefit of doubt and setting aside his conviction and sentence and dismissing the remaining appeals, the Supreme Court observed that the following questions may be asked and answered as a test to determine the rarest of rare cases in which death sentence can be inflicted:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence ?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after

according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

302. The Supreme Court then referred to the guidelines from ***Bachan Singh v. State of Punjab, (1980) 2 SCC 684***, which have to be applied to the facts of each individual case where the question of imposition of death sentence arises. We may quote those guidelines :

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the `offender' also require to be taken into consideration along with the circumstances of the `crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously

exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

303. The Supreme Court further observed that in rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The Supreme Court noted the circumstances in which the community may entertain such sentiment. In our opinion, only the first two circumstances noted by the Supreme Court need to be quoted in the facts of this case namely :

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course of betrayal of the motherland.

304. The Supreme Court then concluded that if upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

305. Mr. Gupte then drew our attention to the judgment of the Supreme Court in ***Kannan & Ors. v. State of Tamil Nadu, AIR 1989 SC 396***. In that case, 9 Harijans were murdered by non-Harijans. Thirty one persons were convicted for murder of Harijans. Except 3, all accused were sentenced to life imprisonment. Three accused were awarded death sentence. The Supreme Court found no infirmity in the appreciation of evidence or assessment of evidence or in the approach of the courts below to the relevant evidence. However, the Supreme Court noted that the

charge of conspiracy framed against all the accused had failed. In the facts before the Supreme Court, the Supreme Court observed that the case of three accused alone cannot be brought under the category of rarest of rare cases. The Supreme Court observed that it would be appropriate to impose sentence of imprisonment of life instead of death sentence on the three accused also.

306. Mr. Gupte also referred to the judgment in ***Ronny's case (supra).*** In that case, the accused were convicted under section 302 read with section 34 of the IPC and sentenced to death for having murdered three members of a family, one of whom was a lady. The medical evidence indicated that there was a violent sexual attack by more than one person on her. The Supreme Court reduced the sentence of death to sentence of life imprisonment.

307. The Supreme Court observed that "with regard to the quantum of punishment to be awarded to persons found guilty of offences dealt with in the Indian Penal Code, the scheme of the Code is that it confers a wide discretion on the court in the matter of awarding appropriate punishment by prescribing the maximum punishment and in some cases both the maximum as well as the minimum punishment for the offence. Though no general guidelines are laid down in the Code for the purpose of awarding punishment, generally the judicial discretion of the court is guided by the principle that the punishment should be commensurate with the gravity of

the offence having regard to the aggravating and mitigating circumstances vis-à-vis an accused in each case. The obligation of the court in making the choice of death sentence for the person who is found guilty of murder is onerous indeed. But by sentencing a person to death, the court is giving effect to the command of law which is in public interest whereas in committing the murder or being privy to commit murder, even if it be a vengeance for another murder, the convict is violating the law which is against public interest. However, on the question of awarding the sentence for the offences for which life imprisonment as well as the death sentence is prescribed, sub-section (3) of section 354 Cr.P.C. enjoins that in the case of sentence of death, special reasons for such sentence shall be stated. Whether the case is one of the rarest of the rare cases is a question which has to be determined on the facts of each case. The choice of the death sentence has to be made only in the rarest of the rare cases and where culpability of the accused has assumed depravity or where the accused is found to be an ardent criminal and menace to the society and; where the crime is committed in an organised manner and is gruesome, cold-blooded, heinous and atrocious; where innocent and unarmed persons are attacked and murdered without any provocation, the case would present special reasons for purposes of sub-section (3) of section 354 of the Criminal Procedure Code."

308. On facts, the Supreme Court observed that A-1 was a qualified civil engineer and a married person having four year old son. A-2 had two daughters and two sons, one of whom was 1½ years old and A-3 had a sick father and he was only 27 years' old and unmarried. The Supreme Court considered that the accused did not have any adverse antecedents. The Supreme Court observed that the victims were unarmed and the heinous crime was committed to rob the valuables of the family. A-1 had committed a dastardly act of committing rape on the wife of his maternal uncle, who was perhaps as old as his mother. The Supreme Court observed that considering the cumulative effect of all the factors, it cannot be said that the offences were committed under the influence of extreme mental or emotional disturbance for the whole thing was done in a pre-planned way. It was also observed that it was not possible for the court to predict that the appellant would not commit criminal act of violence or would not be a threat to the society. However, the Supreme Court considered the ages of the accused and observed that the appellant cannot be considered as too young or too old and the possibility of reform and rehabilitation cannot be ruled out. The Supreme Court further observed that from the facts and circumstances, it was not possible to predict as to who among the three played which part. It may be that the role of one has been more culpable in degree than that of the others and vice versa. The Supreme Court clarified that where in a case like this, it is not possible to say as to whose case falls

within the "rarest of the rare" cases, it would serve the ends of justice if the capital punishment is commuted into life imprisonment.

309. Mr. Gupte also relied on the judgment of the Delhi High Court in ***Lalit Kumar v. The State, 1997 Cri.L.J. 848***. In that case, taking advantage of cordial relationship between the family of the deceased child, the child was kidnapped by the accused, who was 18 years of age at the time of incident. The child was killed ruthlessly for ransom. The Delhi High Court observed that the accused committed the crime in cold blood. He showed no anxiety or restlessness at all before or after committing the murder. The manner in which he committed the crime was ruthless. It is blood curdling to think of the child gasping and writhing for breath when he was throttled to death and then, the child was dumped in a pit in the desolate forest. The Delhi High Court noted that the concern and feeling of resentment was aroused to such an extent that many of them went out of the way, without support of the police, and detected the assailant. The Delhi High Court, however, found that the said case would not fall in the category of rarest or rare case. The observation of the Delhi High Court on which Mr. Gupte has placed reliance may be quoted.

> "*Keeping in view interest to the community at large and the fact that cases of kidnapping and murder for ransom are growing at an alarming rate, it hurts our human conscience*

when we are told that such crime has now become usual, and we too should take a lenient view. At the same time, even if the moralistic aspects are allowed to play a part, we are still unable to say that this particular case falls in the category of "rarest of rare cases". Therefore, bound as we are by the criterion laid down by the Apex Court, we feel compelled by judicial discipline to rule out the extreme punishment of death in this case."

310. Mr. Gupte submitted that if the present case is examined in the light of the above judgments, A-1 cannot be sentenced to death. He submitted that there is nothing uncommon about the crime. In ***Lalit Kumar's case (supra)***, the Delhi High Court was dealing with a case of kidnapping and murder for ransom. Yet the Delhi High Court held that it did not fall in the category of rarest of rare cases. Mr. Gupte contended that as observed by the Supreme Court in ***Ronny's case (supra)***, in this case also, it is not possible to predict who among the three played which part. It may be that the role of others may be more culpable than that of A-1 and vice versa and, hence, ends of justice would be served if the capital punishment is commuted to life imprisonment. Mr. Gupte contended that if the balance sheet of aggravating and mitigating circumstances is drawn up and mitigating circumstances are accorded full weightage then this court will have to commute the capital punishment to life imprisonment. He

submitted that A-1 has roots in the society. He is an educated young man. He was just married prior to the incident. His father is in Government service. He has no antecedents. He will not be a menace to the society. Mr. Gupte further contended that this court should lean towards reformative sentence rather than awarding extreme penalty of death. The possibility of A-1 reforming himself cannot be ruled out. He urged that this court may adopt a humane approach and give A-1 a chance to turn a new leaf, by commuting the death sentence to life imprisonment.

311. Ms. Kejriwal, the learned A.P.P. on the other hand contended that the murder is committed in an extremely brutal and diabolical manner. This case squarely falls in the category of rarest of rare cases and, hence, the death sentence may be confirmed. The learned A.P.P. has also relied on several judgments. We may refer to only the relevant judgments.

312. In ***Sevaka Perumal, etc. v. State of Tamil Nadu, AIR 1991 SC 1463***, the accused had enticed young boys and committed their murders for money. The accused were sentenced to death. The Supreme Court observed that protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. The Supreme Court further observed that the facts and circumstances in each case, the nature of the crime; the manner in which it was planned and committed, the motive for commission of the crime, the

conduct of the accused and all other attending circumstances are relevant facts which would enter into the area of consideration. It was argued that the accused are the bread winners of the family and, hence, death sentence be commuted to life sentence. The Supreme Court observed that there was no force in these submissions. The compassionate grounds would always be present in most cases and are not relevant for interference.

313. The observations of the Supreme Court in ***Dhananjay Chatterjee v. State of West Bengal (1994) 2 SCC 220***, may also be usefully referred to. While confirming the death sentence, the Supreme Court observed :

"*In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public adhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.*"

314. In ***Mohan & Ors. v. State of Tamil Nadu, (1998) 5 SCC 336***, the accused entered into a conspiracy to get Rs.5 lacs as ransom from the father

of the deceased by kidnapping the deceased. They kidnapped the boy, detained him at a place, phoned his father for money and told him that if money is not paid, the boy would be killed. On 29/6/1993, the accused mixed some copper sulphate in a cold drink and offered the same to the deceased while they had already tied the legs and hands of the deceased. The accused began strangulating the boy by tying the boy's neck with a rope and pulling it's both ends and closing the mouth of the deceased with a piece of cloth. By this process, they killed him by strangulation. Thereafter, the dead body of the boy was kept in an empty T.V. box and the box was dropped into an unused well. Even after killing the boy, they contacted his father, got ransom of Rs.5 lacs and divided it among themselves. The accused were sentenced to death. The Supreme Court found that there were mitigating circumstances in the case of two accused. But the sentence of death of Mohan and Gopi was confirmed. The Supreme Court observed that Mohan and Gopi tied the hands and legs of the boy and also tied the rope round his neck and pulled the rope from both the ends. Mohan told the accused to complete the work. At that time, Gopi tied the right hand of the boy. Mohan stood on the left hand side and suddenly encircled the rope around the neck of the boy. Gopi and Mohan pulled ends of the rope and at the same time Mohan took out a kerchief and gagged the boy with it. The boy died. Thereafter, they packed the body in the box. The Supreme Court observed that these aggravating circumstances on the part of accused Mohan and Gopi clearly demonstrate their depraved state of

mind. After killing the boy and disposing of his body, Mohan did not lose his lust for money and got the ransom of Rs.5 lacs. In view of the said aggravating circumstances, the Supreme Court confirmed the death sentence.

315. The facts of the instant case are almost identical with the case which was before the Supreme Court. Kartikraj was friend of A-1. He trusted A-1. A-1 hatched the conspiracy to abduct him for ransom and kill him thereafter and to dispose of the dead body by cutting it and putting it in bags. For that purpose, at the instance of A-1, bags were purchased. On a false pretext Kartikraj was brought to the flat. He walked in, unarmed only to be murdered in a most brutal manner. He was made to drink liquor. He was made to believe that he was called for marry-making. At night, he was threatened with a sickle and a revolver. His hands and legs were tied as instructed by A-1. Napkin was tied round his mouth. Then at the instance of A-1, threatening calls were made to Kartikraj's parents. Kartikraj was also made to talk to them. On 8/8/2001, in the morning A-1 disposed of Kartikraj's motorcycle. Thereafter, A-1 and A-2 pulled the ends of the rope tied round Kartikraj's neck. A-1 confirmed that Kartikraj was dead. Thereafter, A-1 separated the head of Kartikraj with a sickle. He separated the hands and legs also. For cutting one of the legs, A-1 turned it into 360 degrees and cut it with hacksaw blades. Middle portion was wrapped in bed sheet and a big bag was bought for it as directed by A-1. Thereafter, the

pieces of the body were disposed of. After that, at the instance of A-1, PW-1 contacted Kartikraj's family for money. In fact, the accused were arrested when they had gathered to collect ransom.

316. We find great similarity between these facts and facts in ***Mohan's case (supra)***. There is no doubt that A-1 has exhibited depraved mentality. The murder is committed in an extremely brutal, diabolical, revolting and dastardly manner so as to arouse intense and extreme indignation of the community. There are no mitigating circumstances in this case. A helpless, defenceless friend was killed in a most brutal manner, his body was cut and disposed of and ransom was demanded thereafter. In our opinion, in the circumstances, death sentence of A-1 deserves to be confirmed. As observed by the Supreme Court in ***Sevka Perumal's case (supra)***, compassionate grounds are present in most cases. They are not always relevant for interference. In our opinion, cases of extreme brutality and depravity require firm handling. In doing so, the court would only be carrying out its duty of imposing punishment befitting the crime. In such cases, the court must show reverence to the rights of the victim also. We are not inclined to hold that because A-2 and A-3 are sentenced to life imprisonment, A-1 should also be sentenced to life. We have already noted that there is clear and unimpeachable evidence on record to establish that A-1 is the brain behind the conspiracy. He has played the major and crucial role. We have no doubt about this. There can be no parity in sentence in

the facts and circumstances of the case. In the circumstances, we confirm the death sentence awarded to A-1. Appeal preferred by A-1 is dismissed and the Reference is answered accordingly.

317. Before we part with these matters, we must thank all the counsel for the assistance rendered to us by them. But, we will be failing in our duty, if we do not note our appreciation of the efforts made by the learned A.P.P. Ms. Kejriwal. Because of some personal problems, the Investigating Officer was not available to instruct her. However, Ms. Kejriwal worked tirelessly and very ably assisted us. We wish, in all cases, similar assistance is rendered to us on behalf of the State Government.

D.B. BHOSALE, J. (Concurring)

318. I have gone through the Judgment proposed by my Sister Smt.Ranjana Desai, J. The judgment delivered by her is a piece of conspicuous clarity after marshalling and compressing a mass of evidence. She has extensively dealt with the arguments addressed by the learned counsel for the accused. I find myself in agreement with the conclusions arrived at and the reasonings assigned by her in support thereof. I also agree with the views expressed therein on the legal questions raised in these appeals and the confirmation case. I would like to assign the

additional reasons insofar as the legal questions raised by Mr Gupte, learned senior counsel for the accused, in respect of the evidence of Kumar Gaurav, an accomplice, (for short, "approver"), who was tendered pardon and examined as an approver in the case.

319. The legal questions, qua the approver, raised by Mr Gupte and which I propose to deal with by assigning additional reasons, are threefold. Firstly, looking to the role attributed to the approver, whether the order of tender of pardon to such an accomplice was proper and legal. Secondly, whether the confessional statement recorded by the learned Magistrate (PW 54) under section 164 of Cr. P.C was voluntary and while doing so the procedure, as contemplated under that section and under the instructions issued by the High Court for the guidance of Magistrate contained in paragraph 18 of Chapter I of the Criminal Manual (for short, "Paragraph 18" only) was followed by him (PW 54) scrupulously. And, thirdly, whether or not the approver is a reliable witness. It was submitted that while dealing with the evidence of the approver, the learned Addl.Sessions Judge failed to address this preliminary question. In support of these grounds of challenge heavy reliance was placed, mainly, upon the Judgments of the Apex Court in ***Shrawansingh Rattan Singh Vs. State of Punjab -AIR 1957 SC 637; Rampal Pithwa Rahidas & ors Vs State of Maharashtra -1994 Supp (II) SCC 73*** *and* ***Dagdu and Ors. Vs. State of Maharashtra - 1977 (3) SCC 68.***

320. In support of the aforesaid contentions, Mr Gupte, learned senior counsel for the accused, besides the testimonies of the approver and other witnesses, drew our attention to the several documents on record consisting of the confessional statement recorded by the Magistrate (PW 54) under section 164 Cr P.C; an application dated 21.3.2002 filed under section 307 of the Criminal Procedure Code (for short, "Cr.P.C."); the order dated 3.4.2002 of tendering pardon to the approver; Exhibit 33 dated 29.10.2001, Exhibits 52, 53; Article-B dated 6.11.2001; Exhibit-4 dated 18.2.2002; and the application dated 3.4.2002 - Exhibit-12. Exhibit-33 is the letter/application dated 29.10.2001 of the approver expressing his desire to make confession. Exhibits-52 and 53 are the diary extracts. Both these documents are in the approver's handwriting and they were produced on record in the course of his cross-examination. Article-B dated 6.11.2001 is the first retraction of the confession recorded by the Magistrate (PW 54) on 30.10.2001 and 1.11.2001. Exhibit-4 dated 18.2.2002 is the second retraction and the application-Exhibit-12 dated 3.4.2002 is the withdrawal of Article-B and Exhibit-4.

321. At the outset, I would like to deal with the first ground of challenge that the order of tender of pardon dated 3.4.2002 was wrong and illegal. It was submitted that Kumar Gaurav, an accomplice, was selected by the prosecution to tender of pardon, as stated in the application under section

307 Cr P C, on the wrong premise that his role was comparatively lesser. His role, according to Mr Gupte, learned senior counsel, was equally serious and in any case it was not lesser than other accused. As a matter of fact he was eldest in age amongst the accused; he had criminal antecedents; he played active role even while killing deceased-Kartikraj by holding his legs and thereafter he played major role in making calls for extracting ransom from his mobile and STD booths. The Magistrate, while tendering the pardon to the approver, did not apply his mind to these facts as also the conduct of the approver who had retracted his confession twice. The first retraction was within a period of one week from the date of recording of the statement under section 164 Cr.P.C. Mr Gupte further submitted that there was no reason and/or any material on record for being satisfied that the approver would make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence as contemplated under sub-section (1) of section 306 of Cr.P.C.

322. Section 306 Cr.P.C confers power upon the Chief Judicial Magistrate or a Metropolitan Magistrate as well as the Magistrate of the First Class to tender pardon to a person on a condition of his making a full and true disclosure of whole of the circumstances within his knowledge relating to the offence. Section 307 also confers similar powers upon the Court to which commitment of a case is made "on the same condition". The

expression "on the same condition" clearly refers to the condition of tendering a pardon engrafted in sub section (1) of Section 306. The law in this regard is no longer res integra. The Supreme Court in ***A Deivendram V/s State of Tamil Nadu, AIR 1998 SC 2821*** had an occasion to deal with the provisions contained in sections 306 and 307 of Cr.P.C. In paragraph 11 thereof, Their Lordships observed that under section 307 when pardon is tendered after commitment of the proceedings by the Court to which the commitment has been made the legislature mandate is that the pardon would be tendered on the same condition. The expression "on the same condition" obviously refers to the condition of tendering a pardon engrafted in sub-section (1) of Section 306, the said condition being the person concerned on making a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. In the present case the trial Court granted pardon to Kumar Gaurav by exercising powers under section 307 Cr.P.C. It is thus clear that the paramount consideration for tendering pardon to an accomplice is the satisfaction of a Court that he will make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence as contemplated in sub-section (1) of Section 306.

323. Moreover, the law is well settled that it is for the prosecution to ask that a particular accused, out of several, may be tendered pardon. If the prosecution thinks that the tender of pardon will be in the interests of a

successful prosecution of the other accused whose conviction is not easy without the approver's testimony, it is open for the prosecution to agree to the tendering of pardon to a particular accused. The power to tender pardon which the learned Judge exercises, is not on his own behalf but on behalf of the prosecuting agency and must, therefore, be exercised only when the prosecution joins in the request. The learned Judge or the Magistrate must not take on himself the task of determining the propriety of tendering pardon in the circumstances of the case. This has been settled by Supreme Court in ***Lt.Commander Pascal Fernandes Vs. State of Maharashtra - AIR 1968 Supreme Court 594***, while dealing with a situation wherein the accused had directly applied to the Special Judge who had suo moto tendered pardon without referring it to the prosecution. In yet another Judgement in ***Jasbir Singh Vs Vipin Kumar Jaggi and others, 2001 Supreme Court Cases (Cri) 1525***, the Apex Court in paragraph 18 thereof reiterated the principle of law emerged in ***Lt. Commander Pascal Fernandes*** case and further observed that "although the power to actually grant the pardon is vested in the court, obviously the Court can have no interest whatsoever in the outcome nor can it decide for the prosecution whether particular evidence is required or not to ensure the conviction of the accused. That is the prosecution's job." It is thus clear that the selection of an accomplice to be tendered a pardon is a choice of the prosecution though it is open for the Court to reject such application on being satisfied that the accomplice shall not make a

full and true disclosure of the whole of the circumstances within his knowledge relative to the offence. An extent of a role cannot be a consideration while exercising the powers under section 306 and/or 307 Cr.P.C.

324. In the present case, it is clear from the order dated 3.4.2002 that the learned trial Judge tendered pardon to the approver on being satisfied that he will disclose all true and correct facts within his knowledge before the Court. For arriving at this conclusion, the learned Judge did take into consideration the confessional statement recorded under section 164 Cr.P.C as also the retractions made by him. He also ascertained from the approver whether he would make a full and true disclosure as contemplated in sub-section (1) of section 306. Further more, a bare perusal of the statement under section 164 Cr.P.C as also the testimony of the approver clearly show that the order dated 3.4.2002 of tender of pardon was not wrong and illegal. We find absolutely no infirmity in the order granting pardon under section 307 of Cr.P.C.

325. It was next contended that the approver had retracted his confessional statement twice, firstly, by application dated 6.11.2001 (Article-B) and, secondly, by application dated 18.2.2002 (Exhibit-4), which clearly demonstrate that he had wavering mind and there is no guarantee that he did make a full and true disclosure as required under

section 306 (1) of Cr.P.C. Moreover, the manner in which he deposed in the Court shows that the approver did not make a full and true disclosure and, therefore, he cannot be held to be reliable witness which is a basic requirement to base conviction upon such evidence. It was further submitted that because of the retraction the confessional statement lost its voluntary nature.

326. We have perused the retractions Article-B dated 6.11.2001 and Exhibit-4 dated 18.2.2002. Though the approver has denied his handwriting and signature on the application Article-B, a clear reference thereto is made in the application dated 18.2.2002 (Exhibit-4) which was admittedly sent by him in his own handwriting to the Addl. Sessions Judge, Pune. In view thereof, I proceed to consider the submissions on the assumption that the application dated 6.11.2001 (Article-B) was also sent by him. Both these documents clearly indicate that he had retracted the confession. Article-B and Exhibit-4 are quoted hereinbelow in extenso for better appreciation of the submissions made by the learned counsel for the accused.

Article-B:

Before the Hon'ble J.M.F.C. A C.Court
Shivajinagar, Pune.

"Ref. C.R.No.335/2001
Deccan Gym.Police Station. Dt 6/11/01

In the matter -

The State	….	Complainant
V.		
UTP No.5307 Santoshkumar Bariar and other 3	….	Accused

Yerawada Central Prison, Pune-6

Subject: Regarding Mental Pressure applied by police on me to become witness of Pardon.

Applicant : UTP No.5305 Kumar Gaurav (Applicant Accused 5305, Yerawada Central Prison, Pune.

Most Respectfully Sheweth,

I the above applicant accused UTP No.5305 Kumar Gaurav (Accused No.4) state and submit as under.

That, I have been languishing in the prison along with my 3 other co-accused under above ref. crime. I have no nexus with the crime. During my tenure in jail I am being continuously harassed by C.P. office Crime Branch police asking me to become witness of pardon in above case.

That, not only this but they have kept me in separate confinement in C.G.barak which is against my wish at any cost I am not prepared to become pardon witness because as submitted above I have been falsely implicated under above case.

It is therefore prayed that I may be issued a copy of chargesheet so as to enable me to defend myself. I will be indebted if the hon'ble Sir would kindly interfere in the matter and oblige.

Yours sincerely,
sd/- (Kumar Gaurav)
(UT -5305 Kumar Gaurav)
YCP Pune -411 006.

Exhibit-4

Shri P.S.Mane,

The Hon'ble Addl.Sessions Judge,
Shivajinagar Court, Pune (Maharashtra)

Ref: Complaint in relation to my application dated 06.11.01 in Deccan Police Stn C.R.No.335/2001 dated 09.08.01.

Applicant: Kumar Gaurav Sri Mani Bhushan, UTN -637 Yarvada Central Prison, Pune-6

Sir,

Most humbly and respectfully I beg to say that on 06.11.01 I have sent an application to JMFC Shri Rathode Shaheb, Shivajinagar Court at Pune, that on 01.11.01 I was taken by Crime Branch Police Pune in a private car in Court, where my false statement was recorded in presence of JMFC Court, Pune under pressure, threat and promise by Crime Branch to make me pardon witness or otherwise to kill me in encounter.

Sir, I request you to kindly take necessary action as no information has been given uptill now from Sri Rathod Saheb on my application dated 06.11.01.

Sir, I made my statement on 01.11.01 due to fear of my life. So you are requested to take early action so an innocent youth who is also NSS Cadet falsely implicated in this case be saved.

Dated: 18.2.02

Yours faithfully,

Kumar Gaurav
UTN 637, YCP, Pune-6'

327. In paragraph 47 of the examination-in-chief, the approver has categorically stated that he had sent that application (Exhibit-B) under pressure. His father had told him in the Jail that he was receiving threats

and the entire family life was disturbed and they would not live happily unless he retracts his confession. His father had given him a draft application purportedly written under the instructions of S.Bariyar -accused no.1. He has further stated that he had just copied that application on a piece of paper and returned the said draft. In the course of his examination, the approver was confronted with another application dated 3.4.2000 (Exhibit-12). By that application addressed to the District and Sessions Judge, Pune he had withdrawn the retraction applications (Art-B and Exh.4) stating that he had sent those applications under pressure. On the basis of these applications (Art-B, Exhs.4 and 12) it was contended that the confessional statement recorded by the Magistrate (PW 54) was not voluntary one and that there is no guarantee of whatever has been stated by him is a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. The lapses on the part of the Magistrate (PW 54) were also relied upon. In short, it was contended that his confessional statement is not worthy of credence and no order of conviction could be based on such evidence.

328. A perusal of the testimony of the Magistrate (PW 54), shows that the application dated 6.11.2001 (Article-B) was received by him on 9.11.2001. On receipt of the said application he had issued production warrant directing the investigating agency to produce the approver before the Court. The production warrant was issued on 9.11.2001. However, the

approver was not produced in the court till 1.1.2002. PW 54 has admitted in the cross-examination that no accused of this case was produced before him during the period from 9.11.2001 to 2.1.2002. On 1.1.2002, PW 54 enquired with the approver about his application dated 6.11.2001 (Article-B) to which the approver told that he did not send the application Article-B. It is true that the prosecution has not explained the delay of about two months in producing the approver before the learned Magistrate despite issuance of the production warrant on 9.11.2001. The approach of the learned Magistrate towards retraction application dated 6.11.2001 was also casual. He did not make serious and genuine efforts to get the accused produced before the Court. He did not make any endorsement either on the application (Article-B) or anywhere in the record of the case about the enquiry that he purportedly made with the approver on 1.1.2002 about the application (Article-B). It is also not clear whether the approver was produced before him on 1.1.2002. The learned Magistrate (PW 54) has explained the lapse on his part stating that he did not feel it necessary to make any endorsement since the approver denied his signature on that application. It is against this backdrop the question is whether or not the said retractions and the lapse on the part of the Magistrate (PW 54) would make the testimony of the approver unreliable and untrustworthy.

329. The law is well settled that if the confessional statement is retracted, it must first be tested whether it is voluntary and truthful inculpating the accused in the commission of the crime. If that test is satisfied, there is no prohibition under the Evidence Act to rely upon the retracted confession to prove the prosecution case or to make the same basis for conviction of the accused as held by the Supreme Court in ***K.I.Pavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin - (1997) 3 Supreme Court Cases 721***. Practice and prudence require that the Court should examine the evidence adduced by the prosecution to find out whether there are any other facts and circumstances to corroborate the retracted confession. It is not necessary that there should be corroboration from independent evidence adduced by the prosecution to corroborate each detail contained in the confessional statement. The court is required to examine whether the confessional statement is voluntary and that it was not obtained by threat, duress or promise. If the Court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true. If the Court on examination of the evidence finds that the retracted confession is true, that part of the inculpatory portion could be relied upon to base the conviction. This is settled by the Apex court in the said (***K.I.Pavunny's case***) judgment. The same principle has been reiterated by the Apex Court in ***Bheru Singh s/o Kalyan Singh Vs. State of Rajasthan (1994) 2 Supreme Court Cases 467***. My sister Desai, J. after marshalling and

compressing a mass of evidence has observed that the approver's statement is inculpatory and reliable inasmuch as the circumstantial evidence produced on record by the prosecution clearly lend support to his version. We have tested that material by applying the high degree of proof and probative value as insisted in capital offences. Keeping in view the aforesaid judgments of the Supreme Court and considering the tested findings recorded and conclusions arrived at on an assessment of the evidence on record, the submission that the approver is not a reliable witness merely because he had retracted his confessional statement twice, must be rejected.

330. Insofar as the second legal question raised by Mr Gupte, learned senior counsel is concerned, it was submitted that section 164 of Cr.P.C. prescribes the mode of recording confessional statements. Moreover, the High Court of Bombay has also framed the instructions for the guidance of Magistrate recording confession and statements under section 164 of Cr.P.C, 1973. He further submitted that the instructions contained in paragraph 18 for recording confessional statements, though are not statutory, they require to be followed scrupulously, and if that is not done by the learned Magistrate, recording confession under section 164 of Cr.P.C, such statement becomes inadmissible in evidence and in any case it looses its voluntary nature and, therefore, is not worthy of credence. In support of this proposition, he placed reliance upon the Judgments of this

Court in ***Sanjay Dagadu Jadhav Vs. The State of Maharashtra, 1997 ALL MR (Cri) 197*** *and* ***Vilas Vasantrao Patil Vs. The State of Maharashtra, 1996 Cri. L. J. 1854***. He invited our attention to the evidence of the learned Magistrate (PW 54) and contended that his approach in recording the confession of the approver was absolutely casual and he did not strictly follow the instructions contained in paragraph 18 and in particular clause (vii) thereof. Our attention was also drawn to Exhibit-52 and paragraph 8 thereof in particular to submit that after recording a preliminary statement of the approver on 31.10.2001 the learned Magistrate before recording second part of the statement on 1.11.2001 did not verify from the approver whether he was kept in judicial custody during last 24 hours for reflection. Paragraph 8 of Exhibit-52 clearly shows that after recording a preliminary statement on 31.10.2001, from Court the approver was taken to the Crime Branch where he was explained as to what confession he was to make before the Magistrate on 1.11.2001. He was there till 8 pm. Our attention was also drawn to the observations made by the Apex Court in ***Shrawansingh's case*** wherein the Supreme Court has observed that it would be reasonable to insist upon giving an accused person atleast 24 hours to decide whether or not he should make a confession. Reliance was also placed on the Judgment of the Supreme Court in ***Dagdu's case*** wherein the Supreme Court has observed that the Magistrate should make efforts to ascertain from the accused that he is making the

confession voluntary and "where" the accused was sent after he was given time for reflection. Mr.Gupte, submitted that the Magistrate, though put several other questions contained in paragraph 18, did not bother to find out "where" he was sent or kept after he was given time for reflection. It is against this backdrop, according to Mr Gupte, the confessional statement ought not to have been accepted and/or admitted in evidence.

331. My learned sister has dealt with these submissions and has recorded a positive finding that the approver was not taken to the Crime Branch after recording his confessional statement on 31.10.2001 as reflected in paragraph 8 of Exhibit-52. I am in agreement with the finding recorded by her in paragraph 105 of this judgment. However, I propose to examine the submissions of Mr.Gupte on the assumption that the approver was taken to the Crime branch before recording the second part of the confession on 1.11.2001 and test whether it lost its voluntary nature and thereby made the testimony of the approver unreliable and untrustworthy.

332. Before we deal with the submissions of the learned counsel for the parties it would be advantageous to look into the relevant provisions of law. Section 24 of the Indian Evidence Act makes a confessional statement irrelevant in a criminal proceedings if the making thereof appears to

have been caused by any inducement, threat or promise, having reference to the charge against the accused. Section 163 of Cr.P.C bars a police officer or any person in authority from offering or causing to be offered any inducement, threat or promise as is referred to in Section 24 of the Indian Evidence Act. Section 164 of Cr.P.C prescribes the mode of recording confessional statements. Besides, the High Court of Bombay has also issued instructions for the guidance of Magistrate recording confession and statement under section 164 of Cr P.C. Those instructions are contained in Paragraph 18 of the Criminal Manual. The instructions require the Magistrate recording a confession to ascertain from the accused whether he is making the confessional statement voluntarily and to find what the accused desires to state appears to be true. Paragraph 18 prescribes the procedure as to how confessional statement under section 164 of Cr.P.C should be recorded by the Magistrate. The stress was on clause (vii) of paragraph 18 to contend that the Magistrate (PW 54) did not maintain any record to show "where" the accused was sent after he was given time for reflection. Clause (vii) of paragraph 18 reads thus:

> "(vii). Thereafter, the Magistrate should give the accused a reasonable time, which should ordinarily not be less than 24 hours, for reflection in circumstances he would

be free from the influence of the police and any other person interested in having the confession recorded."

It is true that the act of recording confession under section 164 of Cr.P.C is a very solemn act and in discharging his duties under the said section, the Magistrate must take care to see that the requirements of section 164 as well as the instructions issued for the guidance of Magistrates recording the confessional statement are fully satisfied. The whole object of putting the questions to the accused person, who offers to confess, is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or promise having reference to the charge against the accused persons as mentioned in section 24 of the Evidence Act. A duty is cast on the Magistrate to fully satisfy himself that no inducement, threat or promise is given to the accused persons. For that purpose, when the accused is again produced before the Magistrate after the time given for reflection is over, the Magistrate has again to ascertain from the accused whether he has any complaint to make of ill-treatment against the police or others responsible for his arrest or custody and then he has to caution him again that he is not bound to make confession and that if he does so it would be taken down and may thereafter use as evidence against him. The Magistrate must, by putting questions, try to ascertain whether the accused has agreed to make confession without there being any inducement, threat or promise. Before recording any such confession, the

Magistrate is bound to question the accused persons, and unless upon such questioning he has reason to believe that the confession is voluntary, cannot make note at the foot of the record to the effect that he believes that the confession was voluntarily made. Thus, indubitably, the great responsibility is thrown on the Magistrate while recording the confession and it is not desirable that he should observe the formalities not only given in the printed form but he should observe the spirit and for that purpose he should not be in a hurry in starting to record the confession but he should put forward every endeavour to satisfy fully by questioning the accused whether he is making the confession voluntary and that the time given to him for reflection was sufficient. At this stage it may be noticed that, as observed by the Apex Court in ***State of A.P. Vs Cheemalpati Ganeshrao and Anr –AIR 1963 SC 1850***, from the evidence of the approver it need not appear that he is penitent witness. The motivating factor for an approver is the hope of pardon and not any noble sentiment like contrition evil in which he has participated. Whether the evidence of the approver should in any given case, be accepted or not, will have to be determined, as observed by the Supreme Court, by applying the usual tests such as probability of truth of what he has deposed to, the circumstances in which he has come to give evidence, whether he has made full and complete disclosure, whether his evidence is merely self-exculpatory and so on and so forth.

333. What the Apex Court in ***Dagadu's*** *case (supra)* has observed is also worth noticing at this stage. It was observed that the failure to comply with section 164(3) Cr.P.C, or with the High Court Circulars will not render the confession inadmissible in evidence. Relevancy and admissibility of evidence has to be determined in accordance with the provisions of the Evidence Act. Section 29 of that Act lays down that if a confession is otherwise relevant it does not become irrelevant merely because, inter alia, the accused was not warned that he was not bound to make it and the evidence of it might be given against him. It was further observed that if a confession does not violate any one of the conditions operative under sections 24 to 28 of the Evidence Act, it will be admissible in evidence. A strict and faithful compliance with Section 164 of the Code and with the instructions issued by the High Court affords in a large measure the guarantee that the confession is voluntary. The failure to observe the safeguards prescribed therein are in practice calculated to impair the evidentiary value of the confessional statement.

334. The Apex Court in **Sarawan Singh's** case (supra), in paragraph 10 thereof, observed that there can be no doubt that, when an accused is produced before the Magistrate by the Investigating Officer, it is of utmost importance that the mind of the accused person should be completely freed from any possible influence of the police and the effective way of securing such freedom from fear to the accused person is

to send him to jail custody and give him adequate time to consider whether he should make a confession at all. Further it was observed that it would naturally be difficult to lay down any “hard and fast rule” as to the time which should be allowed to an accused person in any given case.

335. The Apex Court, in yet another Judgment ***in Henry Westmuller Roberts Vs State of Assam - AIR 1985 SC 823***, while dealing with the situation in which the approver was given hardly 3 hours' time for reflection, has observed that it is not possible to reject the confessional statement merely because only 3 hours' time had been given for reflection, if it is otherwise acceptable. Therefore, it is necessary to note what the approver has stated in his confession to find out whether intrinsically they are voluntary statements or tutored one made under coercion.

336. In the present case the confessional statement of the approver is quite long. It was made in graphic details. The confession was full of facts and minutes details. The circumstantial evidence relied upon by the prosecution, as discussed earlier, undoubtedly lend assurance to the genuineness and voluntary nature of the confession. It is true that at one stage the confessional statement was retracted by the approver but, as observed earlier, he withdrew the said retraction and stood firm with the confessional statement made before the Magistrate. It is against this backdrop the examination of the confessional statement would show that

it was voluntary and that the Magistrate (PW 54) while recording the said statement under section 164 Cr P C did follow the procedure contemplated under that section and under the instructions contained in paragraph 18. We did not find any error worth the name in the procedure followed by the Magistrate. If the statement of the approver under section 164 Cr.P.C. was not voluntary and/or he was forced or compelled to make such statement he would not have given such graphic details and it would not have received corroboration in material particulars from the other evidence on record. In other words, the approver would not have given such statement if it was a result of tutoring or of compulsion or was extracted by inducement, promise or threat. I will be dealing with a question as to when and how Kumar Gaurav decided to be an approver little later.

337. Let me now consider the effect of taking the approver to the crime branch on 31.10.2001, as claimed by the defence, where, according to them, he was explained and/or told as to what confessional statement he should make. Mr.Gupte, submitted that next day the Magistrate did not make any effort to ascertain from the approver "where" he was sent after he was given time for reflection and, therefore, the statement was not voluntary and/or free from inducement, promise or threat. The confessional statement and the testimony of the Magistrate (PW 54) would show that the approver was produced before the Magistrate on 31.10.2001

at 2 pm for recording his statement under section 164 Cr.P.C. After recording the first part of his statement on 31.10.2001, the learned Magistrate, in order to give him 24 hours time for reflection, sent the approver in judicial custody and directed to produce him on 1.11.2001 at 2 pm for recording further statement (Part-II). The accused was accordingly produced before the Magistrate at 2 pm on 1.11.2001. This was not disputed by the learned counsel for the accused. Therefore, even if it is assumed that the approver was taken to the Crime Branch on 31.10.2001 till 8 pm, as reflected in paragraph 8 of Exhibit-52, it is clear that for about 18 hours (from 8 pm on 31.10.2001 till 2 pm on 1.11.2001) he was in judicial custody. Keeping that in view and considering the judgment of the Apex Court in ***Henry Westmuller Roberts'*** case (supra), in my opinion, taking the approver to the Crime Branch, would not affect or vitiate the confessional statement. The Apex Court in ***Henry Westmuller Roberts'*** case had observed that it was not possible to reject the confessional statement merely because only three hours' time had been given for reflection since the confessional statement was otherwise found acceptable. It would not be possible for us to accept that the person would make such graphic statement as a result of tutoring and by inducement or promise or threat. In the present case, the approver on 1.1.2002, when was produced before the Magistrate after reflection, he expressed his wish to make a statement. He was also specifically asked whether 24 hours time given to him for reflection was sufficient, to which

he replied in affirmative. Then all other formal questions were put to the witness before recording his confession. No infirmity worth the name was found in the manner in which the confessional statement was recorded or in the procedure followed by the Magistrate (PW.54).

338. That takes me to the last submission of Mr Gupte, learned senior counsel for the accused, that the approver is not a reliable witness. The contentions urged in support of this ground of challenge were three-fold. The testimony of the approver is full of omissions and contradictions which clearly demonstrate that he is not a reliable and truthful witness. Exhibits 52 and 53 further demonstrate that there was consistent and persistent pressure on the approver to make a confessional statement, which further demonstrates that his confessional statement is not worthy of credence and, lastly, the questions as to when the approver came to be arrested?; How did he become participant in the crime?; What role did he play in the crime?; When and how he decided to be an approver?; have not been addressed by the learned Judge in a proper perspective. Moreover, according to Mr Gupte, the evidence of the approver does not implicate each of the accused. At the outset, let me note that my learned Sister has extensively dealt with the omissions and contradictions in this judgment and in particular in paragraph nos.130 to 152. She has also considered the submissions advanced by Mr Gupte in respect of Exhibits 52 and 53 in paragraphs 100, 110, 111 and 112 of this

judgment. I do not wish to add anything more in respect of the omissions, contradictions and Exhibits 52 and 53.

339. Before I proceed further, it would be advantageous to see the relevant provisions of law on the point that falls for my determination. It is now well settled that though section 133 of the Indian Evidence Act expressly provides that an accomplice is a competent witness against his co-accused and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, it has been a long settled practice of law that section 133 must be read along with the provisions of Illustration (b) to section 114 of the Evidence Act. Section 114 of the Evidence Act provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the natural course of natural events, human conduct and public and private business, in their relations to the facts of the particular case. Illustration (b) to section 114 says that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Thus, it follows that whereas law permits the conviction of an accused person on the basis of uncorroborated testimony of an accomplice by virtue of the provisions of Section 133 who is treated as a competent witness, the rule of prudence which has rightly been always accepted by the courts, embodied in Illustration (b) of Section 114 of the Evidence Act, strikes a note of caution to the Courts that an accomplice does not

generally deserve to be relied upon, unless his testimony is corroborated in material particulars. My learned sister has made reference to several judgments of the Apex Court dealing with the provisions of sections 133 and 114 of the Evidence Act. I, therefore, avoid reference to the judgments on this point, except the judgment in ***Rampal Pithwa Rahidas*** case (supra). The Apex Court, in this judgment has observed as to what are the tests those need to be applied while appreciating the evidence of an approver so as to find out whether he is a reliable witness. In paragraph 10 of ***Rampal Pithwa Rahidas*** case, the Apex Court observed thus :

> "10. The above principle has stood the test of time and it is with this background present in our minds that we shall examine the testimony of Ramcharan approver PW 49. How he came to be arrested? How did he become a participant in the crime? What role did he play in the crime? When and how he decided to be an approver? These are some of the questions which we shall have to consider to determine the creditworthiness of his testimony and the nature and the extent of corroboration which is required before his testimony can be relied upon in support of the prosecution case."
>
> (emphasis supplied)

340. What emerges from the judgments of the Apex Court is that the appreciation of an approver's evidence has to satisfy a double test. The approver's evidence must show that he is a reliable witness and that is a test which is common to all witnesses. If that test is satisfied the second test would be that the approver's evidence must receive sufficient corroboration. This test, as observed by the Apex Court, is special to the cases of weak or tainted evidence like that of the approver. Moreover, while examining the testimony of the approver, the questions posed by the Supreme Court in paragraph 10 of the ***Rampal Pithwa Rahidas*** case will have to be addressed by a Court in a proper perspective to determine the creditworthiness of his testimony and the nature and the extent of corroboration which is required before his testimony can be relied upon in support of the prosecution case. The law is, thus, clear that if the approver is found to be unreliable or is a planted witness and his testimony is not worthy of credence and is uninspiring and unacceptable justifying his rejection outright, it will be futile and wholly unnecessary to look for corroboration of his testimony. It is only when the approver's evidence is considered otherwise acceptable that the Court applies its mind to the rule that his testimony needs corroboration in material particulars connecting or tending to connect each one of the accused with the crime charged.

341. Mr Gupte concentrated more on the last question, as reflected in paragraph 10 of ***Rampal Pithwa Rohidas*** case, that "when and how Kumar Gaurav decided to be an approver?" The trial Court has not addressed this question at all to hold that the approver is a reliable witness. He further contended that the manner in which he was compelled and/or forced to make a confessional statement and he was tendered pardon and examined as an approver it cannot be said that he is a reliable witness and that his testimony is worthy of credence. In my opinion, all the questions reflected in paragraph 10 of the said Judgement have been addressed by us extensively. However, I would like to add few more lines in reply to the last question.

342. The approver and the accused before Court were nabbed on 12.8.2001. The formal arrest of all the four accused was shown on 13.8.2001. They were produced before the Magistrate on 14.8.2001 when they were sent to police custody remand for 14 days. On 27.8.2001 the accused were remanded to magisterial custody. The approver was interrogated on 14.8.2001 when he claims that he told the truth to the police. Thereafter, he led the police party to different places from where the telephone calls were made for extortion and also to the flat at Naigaon, Mumbai from where their blood stained clothes were recovered. In paragraph 45-A of his testimony he has categorically stated that when he was taken to Yeroda Jail on 27.8.2001 he was repenting for what he did

and he was thinking that he should disclose everything to the Court. He was ready to accept any punishment awarded by the Court and he decided to make confessional statement, though the letter Exhibit-33, expressing desire to make confession, in fact, was sent by him on 29.10.2001 to the Police Commissioner through the Jail Superintendent.

343. It reveals from the cross examination of the approver that he had decided to make confessional statement 2-3 days after 27.8.2001. On two-three occasions he made an attempt to inform the Magistrate, when he was produced before the Court, that he desired to make confessional statement. However, he could not express his desire to the Magistrate. He was not even knowing that the confessional statements are made before the Magistrate. It appears that he had also consulted the lawyer as to whether he should make confessional statement. The approver sent a letter dated 29.10.2001 (Exhibit-33) to the Police Commissioner through the Jail Superintendent. In view of that letter on 31.10.2001 he was produced before the JMFC (AC) Court. It appears that the learned Magistrate (PW.54) recorded his confessional statement in two parts after following the due procedure laid down by the High Court in the Criminal Manual on 31.10.2001 and 1.11.2001. The statement of the approver recorded by the Magistrate is also running into several pages giving graphic details. I did not find anything unnatural and artificial in the background, as stated by the approver in his testimony, in which he made

the confessional statement and was tendered pardon. The stages at which he started repenting for what he did and expressed his desire to make a confessional statement, it cannot be said that it was a result of promise or inducement or compulsion or tutoring. Even if it is accepted that there was consistent and persistent pressure, as reflected in Exhibit-52 and as contended by Mr Gupte, on the approver to make confessional statement, looking to the tenor of the statement, the graphic details reflected therein and the manner in which he decided to be an approver, in my opinion, the confessional statement was voluntary and worthy of credence. In this connection, I may usefully refer to the observations of the Apex Court in ***Henry Westmuller's*** case (supra), in which the Apex Court had an occasion to deal with somewhat similar situation. The relevant observations read thus:

> "As remarked by the learned Sessions Judge these confessions are full of facts and minute details which would not be there normally if the confessions are the result of tutoring or of compulsion. The circumstantial evidence relied upon by the trial court and the High Court lend assurance to the genuineness and voluntary nature of these confessions. They have no doubt been retracted, but in view of the fact that they are generally corroborated by the circumstantial evidence in ample measure, there is no satisfactory reason for the confession not being

accepted and acted upon. In these circumstances, we agree with the learned Sessions Judge that the confessional statements of Henry and Sunil, Exs.6 and 7, are voluntary and can be acted upon, together with the circumstantial evidence, for basing a conviction."

Keeping the observations of the Apex Court in view and considering the confessional statement recorded by the Magistrate (PW 54) and the approver's testimony which we found consistent in all material particulars, in our opinion, merely because Exhibits 52 and 53 show that there was persistent and consistent pressure on the approver and he has made graphic statement, it cannot be said that it was the result of tutoring or of compulsion or was made due to inducement, threat or promise. There is absolutely no satisfactory reason for the confession not being accepted and acted upon.

344. It is true that the present case would definitely not fall in the category where the conviction can rest upon the uncorroborated testimony of the approver and, therefore, there was no question of dispensing with the rule of corroboration in the present case as urged by the learned counsel for the accused. The prosecution, therefore, to bring home the guilt of the accused, examined 54 witnesses to lend assurance to the version of the approver. Their evidence as also the other material placed on record clearly point to the guilt of the accused. In other words, there is sufficient

evidence to arrive at a conclusion that the approver and the appellants herein were the persons responsible for causing murder in question. The evidence of the approver and other evidence in support thereof clearly implicate "each accused" and it does give rise to a conclusion of guilt beyond reasonable doubt.

345. Before we close, we deem it appropriate to make certain observations with regard to the preparation of a paper book. In the present case, besides several printing errors in the paper book, we found substantial portion of the cross-examination in paragraph 70 of the evidence of the approver (PW 1) was completely deleted. At places, we found deletion of words, spelling mistakes and also use of wrong words in the paper book. Often we were required to refer to the original evidence recorded by the trial Court and on several occasions to the evidence recorded in vernacular. Paragraph 4 of Chapter XVII of the Criminal Manual provides for the procedure to be followed in preparation of a paper book. We found that the procedure stipulated under paragraph 4 was not followed scrupulously resulting in several such errors in its printing. We, therefore, expect from all Sessions Judges to be more careful and particular while preparing a paper book in criminal appeals as contemplated in Chapter XVII of the Criminal Manual. That would help us to save the Court time in verifying every apparent error from the original record. This is necessary in the interest of justice. We direct the

Registrar (Judicial) to circulate a copy of these observations only to all the Sessions Judges in the State of Maharashtra and Goa who in turn are expected to bring it to the notice of all the concerned obliged to prepare a paper book in criminal appeals.

(D.B.Bhosale, J.) **(Smt Ranjana Desai,J.)**

346. Today, we have confirmed the death sentence awarded by the trial court to A-1 Santoshkumar Satishbhushan Bariyar. Mr. Gupte, the learned counsel appearing for A-1 has stated that A-1 intends to appeal to the Supreme Court. He has drawn our attention to the provisions of section 415 (3) of the Cr.P.C. Mr. Gupte, the learned counsel for A-1 states that the application for certified copy of the judgment will be made within a week's time from today. In view of the provisions of section 415 (3) of the Cr.P.C., we postpone the execution of the death sentence for a period of 12 weeks from today.

(D.B.Bhosale, J.) **(Smt Ranjana Desai,J.)**